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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 220.

DELINZO A. WALDEN, APPELLANT,

vs.

SHERMAN W. KNEVALS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEBRASKA.

FILED JUNE 5, 1882.

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INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	1	1
Exhibit "A"—An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas Railroad and Telegraph	9	6
Demurrer	13	8
Order overruling demurrer, &c.	14	9
Answer	14	9
Exceptions to answer	27	18
Order allowing withdrawal of exceptions, &c.	29	18
Replication	29	19
Order granting leave to amend bill	30	19
Subpœna	30	19
Marshal's return	31	20
Agreed statement of facts	32	21
Exhibit A—An act to incorporate the Marysville or Palmetto & Roseport Railroad Company	38	24
B—An act relating to railroad companies (session 1862)	45	28
C—Minutes of meeting of stockholders of Marysville or Palmetto & Roseport R. R. Co., April 17, 1862	48	30

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	Original	Print.
Exhibit D—Minutes of meeting of directors of Marysville or Palmetto & Roseport R. R. Co., May 12, 1862	49	31
E—Resolution of president and directors of St. Joseph & Denver City R. R. Co., Oct. 9, 1866	50	32
F—Resolutions of St. Joseph & Denver City R. R. Co.	55	35
G—Proceedings of president and directors of St. Joseph & Denver City R. R. Co., Oct. 9, 1866	56	36
H—Letter of Secretary of Interior to Commissioner General Land Office, March 28, 1870	62	39
I—Letter of Commissioner General Land Office to Register & Receiver, Beatrice, Nebraska, April 8, 1870	63	40
Submission	64	41
Decision of Judge McCreary	65	41
Decree	66	41
Appeal allowed	67	42
Bond	68	42
Clerk's certificate	69	43

1 Pleas before the Hon. George W. McCrary, judge of the circuit court of the United States in and for the eighth judicial circuit and district of Nebraska, at the term of November, A. D. 1881.

Be it remembered that on the 13th day of January, 1880, a bill was filed in the office of the clerk of said circuit court, which said bill is in the words and figures following, to wit:

In Equity.

To the honorable the judges of the circuit court of the United States for the district of Nebraska:

Sherman W. Knevals, of the city and State of New York, and a citizen of said State, brings this his bill against Delinzo A. Walden, of Odell, in the State of Illinois, and a citizen of said State, and Samuel H. Gammon (res. unknown).

And thereupon your orator complains and says:

I. On and long before the 23d of July, 1866, the Saint Joseph and Denver City Railroad Company became and was a corporation, organized under the laws of the State of Kansas, for the purpose and with the corporate power of constructing and operating a railroad from Elwood, in said State, westwardly *via* Marysville, in the same State, to a junction with the Union Pacific railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude.

II. On the 23d of July, 1866, Congress passed an act, entitled "An act for a grant to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph," which was approved on that day, a copy of which is hereto annexed.

On the 9th of October, 1866, the board of directors of the Saint Joseph and Denver City Railroad Company at a meeting held in Elwood, in the State of Kansas, on that day passed a resolu-
2 tion, reciting the act last above entitled, and resolved to accept the same and the terms, conditions, and impositions thereof, and directed its president and secretary to file with the Honorable the Secretary of the Interior a certified copy under the company's seal, of that its resolution and the proceedings of said company accepting the terms, conditions, and impositions contained in said act; and, accordingly, on the 2d of November, 1866, the president and secretary of said company made, under their hands and the seal of said company, such instrument of acceptance, which instrument was, on the 11th of December, 1866, duly filed with the Secretary of the Interior.

III. From the 6th of January, 1870, to and after the 26th of March of that year, Eldridge Whiting was chief engineer of said company, and as such had general charge of the location of the line of said road and the surveys in reference thereto, and employed as deputy or division engineers of said company on said work Albert A. Robinson, William L. Smith, and J. A. McMurtrie. Under the general su-

pervision of said chief engineer, the said deputy or division engineers, during the period last aforesaid, actually surveyed and marked upon the ground the line or route of said railroad from the town of Hiawatha to a junction with the Union Pacific railroad, at the southwest corner of section thirty-six, in township nine north, of range sixteen west, in the State of Nebraska, which said line or route ran through Thayer and Nuckolls counties, in said State, and that part thereof was by the said engineers actually surveyed and marked on the ground in the month of February, and before the fifteenth of March, 1870. And in like manner, and before the 1st of January, 1870, the line or route of said company's road from Elwood to Hiawatha had been actually surveyed and marked on the ground.

IV. The engineer of said company having made a topographical map of the country through which ran the said line or route
3 of said road, and on which the Government surveys and the said line or route were delineated, so that its exact location appeared thereon, with reference, as well to the sections of public lands, as to the towns, counties, and rivers in said region, at a meeting of the board of directors of said company held at Elwood on the 21st of March, 1870, the said map and the line or route of said road delineated thereon was presented, considered, and approved by a resolution of said board. And on the 25th of March, 1870, the said map whereon were delineated the said route as aforesaid, and also due evidence of the location thereof and the aforesaid action of the directors of said company, was filed with the Secretary of the Interior, who duly accepted the same, and on the said day he transmitted the same to the Commissioner of the General Land Office to be filed in that office.

V. On the 8th of April, 1870, the commissioner transmitted a copy of said map to the register and receiver of the land office at Beatrice. The register of said office acknowledged the same by his letter under date of April 13th, 1870.

VI. The said company built and completed, on the first of October, 1869, ten miles of its road from its initial point at Elwood; ten miles on the 15th of October, 1869; the next twenty miles on the 10th of December, 1869; the next thirty miles on the 1st of May, 1870; and the next forty miles on the 15th of July, 1870, being the remainder of its road to Hastings, where it made a junction with the Burlington and Missouri River branch of the Union Pacific Railroad. The road so by it built was upon the line or route delineated on the map aforesaid, and the said road, constructed as aforesaid thereon, ran through Thayer and Nuckolls counties, which are within the district of lands subject to sale at Beatrice; and each section of ten consecutive miles of road was built and completed
4 within the time in that behalf limited in the said act, save the first sixty miles thereof, and the whole line of said road was built and completed to a junction with the said Burlington and Missouri river branch of the Union Pacific railroad, within ten years of the acceptance by the Saint Joseph and Denver City Railroad Company of the grant made to it by the act of July 23rd, 1866.

VII. As each consecutive section of ten miles of said road, begin-

ning at the initial point at Elwood, was completed in a good, substantial, and workmanlike manner, as a first-class railroad, the Governor of the State of Kansas made his certain certificate in due form, and duly attested by him, whereby he certified to the Honorable the Secretary of the Interior that such section was completed in manner aforesaid; and finally, when the road was completed from Elwood to Hastings, at the date hereinbefore in that behalf stated, the Governor, in manner aforesaid, duly certified to the Secretary that the said road and the whole thereof had been completed in manner aforesaid.

VIII. On the 14th day of May, 1870, the said St. Joseph and Denver City Railroad Company made and issued its several bonds for a large aggregate sum, by which it promised to pay the said sum within a day therein fixed, and in order to secure its said bonds it made its certain indenture of mortgage between it as a party thereto of the first part and the Farmers' Loan and Trust Company as the party of the second part, whereby it mortgaged to said Trust Company, among other things, the lands granted to it by Congress by the said act of July 23, 1866, in order to realize the funds to construct its said road, and the same was exclusively applied to that purpose; and no parts of said lands or of the proceeds of its bonds were applied to aid in the construction of any other railroad or part thereof. The said company having made default in the payment of said bonds, or a part thereof, as the same by their terms became due, on the 15th of January, 1874, the said Trust Company exhibited its bill of complaint in this court against said railroad company for the foreclosure of said mortgage and a sale of the mortgaged premises; and such proceedings were thereupon had that on the 13th of November, 1874, and on the 10th of July, 1875, two several decrees were rendered by said court whereby, among other things, it was ordered and decreed that the said mortgage be foreclosed and the lands granted to said railroad company, as hereinbefore stated, and by it mortgaged to said trust company, be sold by and under the direction of one of the masters of said court. In pursuance of said decree, the master of said court, in the said decree named and in that behalf empowered, duly sold said lands to George J. Forest, J. Augustus Johnson, and John J. McCook, and the said master having reported his proceedings upon said sale to the said court, as in the said decree required, on the 13th day of November, 1875, the said court made its certain order in the said cause confirming said sale and the proceedings of the master in that behalf, and directed the said master to make to said purchasers his (master's) deed, conveying the said lands to them; accordingly said master, that is to say, Whitaker M. Grant, as master of the said court, and in pursuance of the said order and decree thereof, made his certain indenture of conveyance bearing date on said day, between himself, as party of the first part, and the said George J. Forest, J. Augustus Johnson, and John J. McCook, as parties of the second part thereto, and recited therein the said decree and order and the proceedings thereon as is usual in such instruments, and thereby the said party of the first part thereto conveyed to

the said parties of the second part thereto the lands hereinbefore referred to. Afterwards the said George J. Forest, J. Augustus Johnson, and John J. McCook, by their certain indenture of conveyance made between them, as parties of the first part, and the Kansas and Nebraska Railroad Company, a corporation duly organized under the laws of the State of Kansas, of
6 the second part, conveyed to said company the lands above referred to. On the 23rd day of September, 1876, the said company, by its indenture of conveyance of that date made between it as party thereto of the first part and Henry H. Butterworth and Charles W. Hassler as parties thereto of the second part, conveyed to said parties of the second part the lands aforesaid. On the 17th day of May, 1878, the said Butterworth and Hassler, by their certain indenture of conveyance of that date made between them as parties thereto [of] first part and your orator as party thereto of the second part, conveyed to your orator certain of the aforesaid lands, and among them that certain piece or parcel of land known and described as follows—that is to say, the S. E. ¼ and the S. E. ¼ of the N. E. ¼ of section twenty-five (25), township four (4), range two (2), in Thayer county, Nebraska, which said parcel of land was granted by Congress to said railroad company by said act of July 23rd, 1866, and was included in the mortgage aforesaid, made by said company to said Trust Company, and sold under the said decree, and conveyed by the several mesne conveyances hereinbefore mentioned. The said land is within ten miles of the said railroad, and when the line of route of said road has been definitely fixed, as hereinbefore stated, it had not been sold by the United States, nor had any right of preemption or homestead settlement attached thereto, nor had the same been reserved by the United States for any purpose whatever.

IX. On or about the 13th day of April, 1870, some person, to your orator unknown, purchased the said parcel of land above described from the United States by private entry thereof at the aforesaid land office at Beatrice, paying therefor one dollar and twenty-five cents per acre, and on or about the 15th day of November, 1871, letters patent of the United States were issued to him out of the Land Department of the Government, and by divers mesne conveyances the title thereto so by him acquired has come to the defendant, who, by virtue of such title, and against your orator, claims to own
7 the said lands in fee. The said lands are of the value of one thousand dollars and over; that said Walden has mortgaged the said premises to the defendant, Gammon, which mortgage remains unsatisfied of record.

When the certificate of the said Governor of Kansas was presented to the Secretary of the Interior, and when the same was on file in this office, that is to say, on the 1st of January, 1870, the said railroad company applied to the said Secretary to issue to it a patent for the parcel of land hereinbefore described, tendering payment of such fee and charges as in the said Land Department are required for such service, but the Secretary refused to issue the same to said company, although the said company repeatedly and properly applied to the said Secretary for a patent for said parcel of land, insisting to him that the

entry and purchase of the same heretofore mentioned had been made after its line had been definitely fixed, and therefore after its said grant had become located and operative, yet he refused, and has ever since refused, to issue the said patent, either to said company or its assigns.

And your orator has repeatedly and in a friendly manner applied to the said defendant to convey the said land to him.

Wherefore your orator submits that the said defendant holds the legal title to said parcel of land in trust for him, and ought to convey the same to him in fee, and your orator well hoped that he would do so.

In tender consideration thereof, and forasmuch as your orator is without remedy, save in this court, where matters of this and the like nature are properly cognizable and relievable;

To the end, therefore, that the said defendant may, if he can, show why your orator should not have the relief hereby prayed, and
8 may, upon his corporal oath and according to the best and utmost of his knowledge, information, remembrance, and belief, full, true, direct, and perfect answer make to all and singular the matters and things hereinbefore stated and charged, and that it be, by the decree of your honors, declared, on the 25th day of March, 1870, the line or route of the road of the St. Joseph and Denver City Railroad Company was definitely fixed, and the grant to it by the act of Congress of July 23rd, 1869, became located and operative, so that upon the construction of its road in manner prescribed by said act, and the advertisement thereof to the Secretary of the Interior, as therein required, it became and was entitled to a patent to the parcel of land above described; that the said patent was issued to and received by the said party hereinbefore referred to, who purchased and entered said lands in trust for said company, and not otherwise, and the title thereunder is now held by said defendant in trust for your orator, and that it be decreed that by an instrument of conveyance, in form to be approved by your honors, the said defendant convey the said parcel of land to your orator, and that the said defendant pay the costs of this suit, and that your orator may have all such other and further relief as the circumstances of the case require and is agreeable to equity:

May it please your honors to grant to your orator the writ of subpœna issuing out of and under the seal of this honorable court, to be directed to the said Delinzo A. Walden and Samuel H. Gammon, therein and thereby commanding him, on a certain day, and under a certain penalty, to be therein inserted, that he personally be and appear before your honors in this court, then and there to answer the premises, and to stand to, abide by, and perform such order and decree therein as to this court shall seem proper, and as shall be agreeable to equity and good conscience.

And your orator will ever pray, &c.

J. M. WOOLWORTH,
Solicitor of Counsel for Pl'ff.

EXHIBIT "A."

Chap. CCXII.

An act for a grant of lands to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas, to construct and operate a railroad from Elwood, in Kansas, westwardly *via* Marysville, in the same State, so as to effect a junction with the Union Pacific railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection; but in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purpose aforesaid, from the public lands of the United nearest to tiers of sections above specified so much land, in alternate sections or parts of sections designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid, which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: Provided, That the land to be so selected shall in no case be located farther than twenty miles from the line of said road: Provided further, That the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same and for no other purpose whatever, and shall be disposed of only as in this act hereinafter provided: Provided, also, That no part of the land granted by this act shall be applied to aid in the construction of any railroad or part thereof for the construction of which any previous grant of lands or bonds have been made by Congress: And provided, further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except so far as may be found necessary to locate the route of said road through said lands; in which case the right of way for one hundred feet on each side of said road only shall be granted, subject to the approval of the President of the United States.

SEC. 2. And be it further enacted, That the sections and parts of

sections of land which by such grant shall remain to the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, at or above the increased minimum price, as aforesaid: Provided, That actual and *bona fide* settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at an increased minimum price aforesaid: And provided, also, That settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy, and cultivate the same for a
11 period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted, That the grant of the lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times be in readiness to transport troops, munitions of war, supplies and public stores upon its roads for the Government when required to do so by any department thereof, the Government at all times having the preference in the use of the road for all purposes aforesaid, at fair and reasonable rates of compensation, not exceeding that paid by private individuals or the average paid for like services on other roads. And the lands hereby granted, held, and reserved, as aforesaid, shall inure to the benefit of said company, as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land hereinbefore granted as lie opposite to and coterminous with the said completed sections. And when certificates of the Governor aforesaid shall be presented to said Secretary, of the completion, as aforesaid, of successive section of ten consecutive miles of road, the said Secretary shall in like manner issue to said company patents for the said sections of said land as aforesaid for each of said sections of road until said road shall be completed: Provided, That if said railroad company or its assigns shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its
12 right to the lands for said section so failing of completion shall revert to the Government of the United States: Provided, further, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

SEC. 4. And be it further enacted, That as soon as the said company shall file with the Secretary of the Interior maps of its lines, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in

such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

SEC. 5. And be it further enacted, That the United States mail shall be transported on said road and its extension, under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law the Postmaster General shall have power to fix the compensation.

SEC. 6. And be it further enacted, That the right of way through public lands be, and the same is hereby, granted to said St. Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also, all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations.

SEC. 7. And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the said Saint Joseph and Denver City Railroad Company shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had
13 and obtained, which acceptance shall be made within six months after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

Approved July 23, 1866.

Upon the back of said bill appear endorsement, in words and figures following, to wit:

No. 257 E. United States circuit court, district of Nebraska. Sherman W. Knevals *vs.* Delinzo A. Walden. Bill. J. M. Woolworth, solicitor for plaintiff. Filed Jan. 13, 1880. Watson B. Smith, clerk.

Thereupon, afterwards, to wit, on the 21st day of May, 1880, a demurrer was filed in said case, which said demurrer is in the words and figures following, to wit:

Demurrer.

In the Circuit Court of the United States held in and for the District of Nebraska.

SHERMAN W. KNEVALS, Plaintiff,
vs.
DELINZO A. WALDEN, Defendant.

And now comes the above-named defendant, by Colby and Hazlett, his solicitors, and demurs to the plaintiff's bill filed herein, and alleges as a ground therefor that said bill does not state facts sufficient to constitute a cause of action against this defendant.

DELINZO A. WALDEN, *Defendant*,
By COLBY & HAZLETT,
His Solicitors.

Upon the back of said demurrer appear endorsements, in words and figures following, to wit:

In U. S. circuit court, district of Nebraska. No. 257 E. Sherman W. Knevals *vs.* Delinzo A. Walden. Demurrer to bill. Filed May 21, 1880. Watson B. Smith, clerk. Colby & Hazlett, solicitors for defendant.

Thereupon afterwards, at the November term of said court, on the 10th day of November, 1880, the following proceedings were
14 had in said case, as appears of record on folio 502, Journal F, of said court:

SHERMAN W. KNEVALS *vs.* DELINZO A. WALDEN.

The demurrer of the defendants in this cause to the bill of complaint therein was heretofore argued by counsel, and the court having taken time to consider of the same, and being now fully advised in the premises, it is ordered that the said demurrer be, and the same is hereby, overruled, and defendant, by his counsel, applying to answer the said bill, it is ordered that the said defendant file his general answer to said bill at or before the January rules, and that the plaintiff file his general replication thereto within five days thereafter.

And thereupon, afterwards, to wit, on the said 3d day of January, 1881, an answer was filed in said case, which said answer is in the words and figures following, to wit:

The Answer of Delinzo A. Walden, the Defendant, to the Bill of Complaint of Sherman W. Knevals, Complainant.

In the Circuit Court of the United States for the District of Nebraska.
In Equity.

The said defendant, now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereto, or unto so much and such parts thereof as the defendant is advised is or are material or
15 necessary for him to make answer unto, the defendant, answering, saith:

He has been informed, and believes it to be true, that on the 23rd day of July, A. D. 1866, Congress passed an act entitled "An act for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph," which was approved on that day. The said act is printed in the 14th volume of the United States Statutes at Large, at page 210, and is annexed to complainant's said bill.

And the said defendant, further answering said complainant's said bill, saith: That he is informed, and believes it to be true, that on or about the 8th day of April, A. D. 1870, Clark Irvine purchased the said parcel of land from the United States by private entry thereof at the said land office at Beatrice, paying therefor $1.25 per acre, and on or about the 1st day of November, 1871, letters patent of the United States were duly issued to him out of the Land Department of the Government, and by divers mesne conveyances the title thereto, so by him acquired, has come to the defendant, Delinzo A. Walden, who, by virtue of such title and against the said complainant, claims to own the said parcel of land in fee; that the said lands are of the value of five thousand dollars and over.

And the defendant, further answering said complainant's said bill, saith: He knows not, and has not been informed, save by the said complainant's said bill, and cannot set forth as to his belief or otherwise, whether on or before or after the 23rd day of July, 1866, the Saint Joseph & Denver City Railroad Company became and was a corporation organized under the laws of the State of Kansas, for the purpose and with the corporate power of contracting and operating a railroad from Elwood, in said State, westwardly *via* Marysville in the same State, to a junction with the Union Pacific
16 railroad or any branch thereof, not further west than the one hundredth meridian of west longitude, as in the said complainant's bill alleged, and therefore denies the same, and leaves the said complainant to make such proof thereof as he shall be able to produce.

And the defendant, further answering, saith: He knows not, and has not been informed, save by the said complainant's said bill, and cannot set forth as to his belief or otherwise, whether on the 9th day of October, 1866, the board of directors of the Saint Joseph & Denver City Railroad Company, at a meeting held in Elwood, in the State of Kansas, on that day, passed a resolution reciting the act of Congress of July 23, 1866, hereinbefore referred to, and resolved to accept the same and the terms, conditions, and impositions thereof, and directed its president and secretary to file with the Secretary of the Interior a certified copy of said resolution and the proceedings of said company accepting the terms, conditions, and impositions contained in said act; nor whether on the 2nd of November, 1866, the president and secretary of said company made, under their hands and the seal of said company, such instruments of acceptance, and filed said instrument on the 11th day of December, A. D. 1866, with the Secretary of the Interior, as alleged in the said complainant's bill, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

And the defendant, further answering, saith: He knows not, and has not been informed, save by the complainant's said bill, and cannot set forth, whether, from the 6th day of January, 1870, to and after the 20th of March of that year, Eldridge Whiting was the chief engineer of said company, and as such had general charge of the location of the line of said road and the surveys in reference thereto, and employed as deputy or division engineers of said company on

said work Albert A. Robinson, William L. Smith, and J. A. McMurtrie; nor whether, under the general supervision of said chief
17 engineer, the said deputy or division engineers, during the period last aforesaid, actually surveyed and marked upon the ground the line or route of said railroad from the town of Hiawatha to a junction with the Union Pacific railroad at the southwest corner of section thirty-six, in township nine north, of range sixteen west, in the State of Nebraska, which said line or route ran through Thayer and Nuckolls counties, in said State, and that part thereof was, by the said engineers, actually surveyed and marked on the ground in the month of February and before the 15th of March, 1870; nor whether, in like manner, and before the 1st of January, 1870, the line or route of said company's road from Elwood to Hiawatha had been actually surveyed and marked on the ground, as in the said complainant's bill alleged, and therefore denies the same, and leaves the said complainant to make such proof thereof as he may be able to produce.

And the defendant, further answering, saith: He knows not, and has not been informed, save by the said complainant's said bill, and cannot set forth, whether the engineers of said company having made a topographical map of the country through which ran the said line or route of said road, and on which the Government surveys and the said line or route were delineated, so that its exact location appeared thereon, with reference as well to the sections of public lands as to the towns, counties, and rivers in said region, at a meeting of the board of directors of said company held at Elwood on the 21st of March, 1870, the said map and the line of route of said road delineated thereon, were presented, considered, and approved by a resolution of said board, whether on the 27th of March, 1870, the said map whereon were delineated the said route, as aforesaid, and also evidence of the location thereof and the aforesaid action of the directors of said company, was filed with the Secretary of the Interior, who duly accepted the same; nor whether on said
18 day he transmitted the same to the Commissioner of the General Land Office, to be filed in that office, as alleged in the said complainant's bill, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

And the said defendant, further answering, saith: He knows not, and has not been informed, save by the said complainant's said bill, and cannot set forth, whether, on the 8th of April, 1870, the Commissioner transmitted a copy of said map to the register and receiver of the land office at Beatrice, nor whether the register of said office acknowledged the same by his letter under date of April 13th, 1870, as alleged in the said complainant's bill, and therefore denies the same, and leaves the complainant to make such proof as he may be able to produce.

And the said defendant, further answering, saith: He knows not whether the said company built and completed, on the first of October, 1860, ten miles of its road from its initial point at Elwood; ten miles on the 15th of October, 1869; the next twenty miles on

the 10th of December, 1869; the next thirty miles on the 1st of May, 1870; and the next forty miles on the —— of ——, 1870, being the remainder of its road to Hastings, where it made a junction with the Burlington and Missouri river branch of the Union Pacific railroad; nor whether the road so by it built was upon the line or route delineated on the map aforesaid; nor whether each section of ten consecutive miles of road was built and completed within the time in that behalf limited in the said act, save the first sixty miles thereof; nor whether the whole line of said road was built and completed to a junction with the said Burlington and Missouri river branch of the Union Pacific railroad, within ten years of the acceptance by the Saint Joseph & Denver City Railroad Company of the grant made to it by the act of July 23d, 1866, as alleged in said complainant's bill, but has been informed that said averments are not true,
19 and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

And the said defendant, further answering, saith: He knows not, and has not been informed, save by the said complainant's said bill, and cannot set forth, whether, as each consecutive section of ten miles of said road, beginning at the initial point at Elwood, was completed, the Governor of the State of Kansas made his certain certificate in due form, and duly attested by him, whereby he certified to the Honorable Secretary of the Interior that such section was completed in manner aforesaid; nor whether, when the road was completed from Elwood to Hastings, at the date hereinbefore in that behalf stated, the Governor, in manner aforesaid, duly certified to the secretary that the said road, and the whole thereof, had been completed in manner aforesaid as alleged in the said complainant's bill, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

And the said defendant, further answering, saith: He knows not whether on the 14th of May, A. D. 1870, the said Saint Joseph & Denver City Railroad Company made and issued its several bonds for a large aggregate sum, by which it promised to pay the said sum within a day therein fixed; and in order to secure its said bonds it made its certain indenture of mortgage between it as party thereto of the first part and the Farmers' Loan and Trust Company as the party of the second part, whereby it mortgaged to said Trust Company, among other things, the lands granted to it by Congress by the said act of July 23, 1866, in order to realize the funds to construct its road, and the same was exclusively applied to that purpose; nor whether any parts of said lands or of the proceeds of said bonds were applied to aid in the construction of any other railroad or part thereof; nor whether the said company having made default in the payment of said bonds, or a part thereof, as the same by their terms became due; on the 15th of January, 1874,
20 the said Trust Company exhibited its bill of complaint in this court against said railroad company for the foreclosure of said mortgage and the sale of the mortgaged premises, and such proceedings were thereupon had that on the 13th of November, 1874, and on the 10th of July, 1875, two several decrees were rendered by said

court, whereby, among other things, it was ordered and decreed that the said mortgage be foreclosed and the lands granted to said railroad company as hereinbefore stated, and by it mortgaged to said trust company, be sold by and under the direction of one of the masters of said court; nor whether, in pursuance of said decree, the master of said court, in the said decree named and in that behalf empowered, duly sold said lands to George J. Forrest, J. Augustus Johnson, and John J. McCook, and the said master having reported his proceedings upon said sale to the said court as in the said decree required, on the 14th day of November, 1874, the said court, by its certain order in the said cause confirming said sale and the proceedings of the master in that behalf, and directed the said master to make to said purchaser his master's deed, conveying the said lands to them; accordingly said master, that is to say, Whitaker M. Grant, as master of the said court, and in pursuance of the said order and decree thereof, made his certain indenture of conveyance, bearing date on said day, between himself, as party of the first part, and the said George J. Forest, J. Augustus Johnson, and John J. McCook, as parties of the second part thereto, and reciting therein the said decree and order and the proceedings thereon, as is usual in such instruments, and thereby the said party of the first part thereto conveyed to the said parties of the second part thereto the lands hereinbefore referred to; nor whether, afterwards, the said George J. Forest, J. Augustus Johnson, and John J. McCook, by their certain indenture of conveyance of that date, made between them as parties of the first part and the Kansas and Nebraska Railway Company, a corporation duly organized under the laws of the State of
21 Kansas of the second part, conveyed to said company the lands above referred; nor whether on the 23d day of September, 1876, the said company by its indenture of conveyance of that date, made between it as a party thereto of the first part, and Henry H. Butterworth and Charles W. Hassler as parties thereto of the second part, conveyed to the parties of the second part the lands aforesaid; nor whether, on the 17th day of May, 1878, the said Butterworth and Hassler, by their certain indenture of conveyance of that date, made between them as parties thereto of the first part and your orator as part[y] thereto of the second part, conveyed to your orator certain of the aforesaid lands, and among them that certain piece or parcel of land known and described as follows, that is to say, the southeast quarter & southeast quarter of the northeast quarter of section twenty-five, in township four north, of range two west, in Thayer county, Nebraska, which said parcel of land the complainant avers was granted by Congress to said railroad company by said act of July 23d, 1866, and was included in the mortgage aforesaid, made by said company to said Trust Company and sold under the said decree and conveyed by the several mesne conveyances hereinbefore mentioned, but as the defendant has been informed and believes that the foregoing averments and allegations as set forth in the said complainant's bill are not true, he therefore denies the same.

And the said defendant, further answering, saith: He knows not, and has not been informed, save by the said complainant's said bill,

and cannot set forth, whether any certificate of the Governor of Kansas was ever presented to the Secretary of the Interior, or filed in his office; nor whether on the 1st of January, A. D. 1870, the said railroad company applied to the said Secretary to issue to it a patent for the said parcel of land hereinbefore described tendering payment of such fees and charges as was required in the said Land De-
22 partment as alleged in the said complainant's said bill, and therefore denies the same, and leaves the said complainant to make such proof thereof as he shall be able to produce.

And the defendant, further answering said complainant's said bill, saith: That the road built by the Saint Joseph and Denver City Railroad Company was not upon the line of route delineated upon the map set forth in the complainant's bill as filed with the Secretary of the Interior; and that the whole line of said road was not built or completed so as to effect a junction with the said Union Pacific railroad or any branch thereof; and that the said Burlington and Missouri River railroad is not a branch of the Union Pacific railroad.

And the defendant, further answering, saith: He has been informed, and believes that it is not true, that when the line or route of said road had been definitely fixed, as stated in the said complainant's bill, that the said parcel of land had not been sold by the United States, nor had the right of pre-emption or homestead settlement attached thereto, nor had the same been reserved by the United States for any purpose whatever, as alleged in the said complainant's said bill, and therefore denies the same.

And the said defendant, further answering, saith: That as to any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not heretofore well and sufficiently answered, confessed, traversed and avoided or denied, he knows not of and has not been informed, save by the said bill of said complainant, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

II. And the defendant, for a further answer to the said complainant's said bill, saith: That the said St. Joseph & Denver City Railroad Company was not, on the 23d day of July, A. D. 1866, nor at any time prior to the —— day of ——, A. D. 1873, a corporation, or authorized to exercise the powers or the rights conferred up-
23 on railroad corporations under and by virtue of the laws of the State of Nebraska; that said railroad company did not file articles of incorporation with the secretary of State of the State of Nebraska, nor did said railroad company adopt articles of incorporation and have them recorded in the office of the county clerk of the counties of Jefferson, Thayer, Nuckolls, Clay, or Adams, or any other county in the State of Nebraska in which said railroad company did business prior to the —— day of ——, A. D. 1873, as required by the statutes of the State of Nebraska. And the defendant saith that the said railroad company did no act or thing whatever to comply with an act of the Legislature of the State of Nebraska, entitled "An act to authorize non-resident railroad companies to build roads in Nebraska," or with any other act of the Legislature

of the State of Nebraska pertaining to said subject, prior to the date last aforesaid, and not until long after this defendant had acquired his title to said parcel of land from the Government of the United States, as hereinbefore stated and set forth. And the defendant alleges the facts to be that said railroad company did not acquire any right or title to the said parcel of land, either equitable or otherwise, until the said —— day of ——, 18—, and long after this defendant had purchased the same as aforesaid; wherefore the defendant insists that his rights are prior to any pretended rights or equities of the said railroad company or its grantees, and that any pretended rights or equities of said company and its grantees are subject and inferior to the rights of the defendant. And the defendant saith that the said Saint Joseph & Denver City Railroad Company, until said date last aforesaid, had no corporate existence in the State of Nebraska and could not and did not acquire any right, title, or interest in or to the above described parcel of land by virtue of the said act of Congress and the construction of its
24 said road in the State of Nebraska, that the said railroad company, by virtue of the said act of Congress and the construction of its road, took only the alternate sections of land, designated by odd numbers, for ten sections in width on each side of said road constructed in the State of Kansas, where said corporation was organized.

III. And the said defendant, for a further answer to the said complainant's said bill, saith: That the Saint Joseph & Denver City Railroad Company did not construct and operate its railroad from Elwood, in Kansas, westwardly *via* Marysville, in the same State, so as to effect a junction with the Union Pacific railroad, or any branch thereof not further west than the one hundredth meridian of west longitude, as required by the terms, conditions, and impositions of said act of Congress, but the said Saint Joseph & Denver City Railroad Company only constructed and operated its railroad to a junction with the Burlington & Missouri River railroad, which was not then, and never has been, a branch of the Union Pacific railroad.

IV. And the said defendant, for a further answer to the said complainant's said bill, saith: That on the 8th day of April, A. D. 1870, the said Clark Irvine purchased the said parcel of land from the United States by private entry thereof at the land office at Beatrice, Nebraska, where the same was subject to entry and sale in good faith and without any notice or knowledge of the alleged claim of the said Saint Joseph & Denver City Railroad Company, or its grantees, whatsoever to said land; and that thereafter, on the first day of November, A. D. 1871, letters patent of the United States were issued to him, in accordance with the said entry and sale, out of the Land Department of the Government for the said parcel of land, and by divers other mesne conveyances the title thereto, so by him acquired, has come to the said defendant, Delinzo A. Walden, who purchased said lands of said Clark Irvine, in good faith, for a valuable consideration at the time of said purchase fully paid, and without
25 any knowledge or notice of the claim of the said railroad company, or its grantees or persons claiming under it, and

and cannot set forth, whether any certificate of the Governor of Kansas was ever presented to the Secretary of the Interior, or filed in his office; nor whether on the 1st of January, A. D. 1870, the said railroad company applied to the said Secretary to issue to it a patent for the said parcel of land hereinbefore described tendering payment of such fees and charges as was required in the said Land De-
22 partment as alleged in the said complainant's said bill, and therefore denies the same, and leaves the said complainant to make such proof thereof as he shall be able to produce.

And the defendant, further answering said complainant's said bill, saith: That the road built by the Saint Joseph and Denver City Railroad Company was not upon the line of route delineated upon the map set forth in the complainant's bill as filed with the Secretary of the Interior; and that the whole line of said road was not built or completed so as to effect a junction with the said Union Pacific railroad or any branch thereof; and that the said Burlington and Missouri River railroad is not a branch of the Union Pacific railroad.

And the defendant, further answering, saith: He has been informed, and believes that it is not true, that when the line or route of said road had been definitely fixed, as stated in the said complainant's bill, that the said parcel of land had not been sold by the United States, nor had the right of pre-emption or homestead settlement attached thereto, nor had the same been reserved by the United States for any purpose whatever, as alleged in the said complainant's said bill, and therefore denies the same.

And the said defendant, further answering, saith: That as to any other matter, cause, or thing in the said complainant's said bill of complaint contained material or necessary for this defendant to make answer unto, and not heretofore well and sufficiently answered, confessed, traversed and avoided or denied, he knows not of and has not been informed, save by the said bill of said complainant, and therefore denies the same, and leaves the complainant to make such proof thereof as he may be able to produce.

II. And the defendant, for a further answer to the said complainant's said bill, saith: That the said St. Joseph & Denver City Railroad Company was not, on the 23d day of July, A. D. 1866, nor at any time prior to the —— day of ——, A. D. 1873, a corporation or authorized to exercise the powers or the rights conferred up-
23 on railroad corporations under and by virtue of the laws of the State of Nebraska; that said railroad company did not file articles of incorporation with the secretary of State of the State of Nebraska, nor did said railroad company adopt articles of incorporation and have them recorded in the office of the county clerk of the counties of Jefferson, Thayer, Nuckolls, Clay, or Adams, or any other county in the State of Nebraska in which said railroad company did business prior to the —— day of ——, A. D. 1873, as required by the statutes of the State of Nebraska. And the defendant saith that the said railroad company did no act or thing whatever to comply with an act of the Legislature of the State of Nebraska, entitled "An act to authorize non-resident railroad companies to build roads in Nebraska," or with any other act of the Legislature

of the State of Nebraska pertaining to said subject, prior to the date last aforesaid, and not until long after this defendant had acquired his title to said parcel of land from the Government of the United States, as hereinbefore stated and set forth. And the defendant alleges the facts to be that said railroad company did not acquire any right or title to the said parcel of land, either equitable or otherwise, until the said —— day of ——, 18—, and long after this defendant had purchased the same as aforesaid; wherefore the defendant insists that his rights are prior to any pretended rights or equities of the said railroad company or its grantees, and that any pretended rights or equities of said company and its grantees are subject and inferior to the rights of the defendant. And the defendant saith that the said Saint Joseph & Denver City Railroad Company, until said date last aforesaid, had no corporate existence in the State of Nebraska and could not and did not acquire any right, title, or interest in or to the above described parcel of land by virtue of the said act of Congress and the construction of its
24 said road in the State of Nebraska, that the said railroad company, by virtue of the said act of Congress and the construction of its road, took only the alternate sections of land, designated by odd numbers, for ten sections in width on each side of said road constructed in the State of Kansas, where said corporation was organized.

III. And the said defendant, for a further answer to the said complainant's said bill, saith: That the Saint Joseph & Denver City Railroad Company did not construct and operate its railroad from Elwood, in Kansas, westwardly *via* Marysville, in the same State, so as to effect a junction with the Union Pacific railroad, or any branch thereof not further west than the one hundredth meridian of west longitude, as required by the terms, conditions, and impositions of said act of Congress, but the said Saint Joseph & Denver City Railroad Company only constructed and operated its railroad to a junction with the Burlington & Missouri River railroad, which was not then, and never has been, a branch of the Union Pacific railroad.

IV. And the said defendant, for a further answer to the said complainant's said bill, saith: That on the 8th day of April, A. D. 1870, the said Clark Irvine purchased the said parcel of land from the United States by private entry thereof at the land office at Beatrice, Nebraska, where the same was subject to entry and sale in good faith and without any notice or knowledge of the alleged claim of the said Saint Joseph & Denver City Railroad Company, or its grantees, whatsoever to said land; and that thereafter, on the first day of November, A. D. 1871, letters patent of the United States were issued to him, in accordance with the said entry and sale, out of the Land Department of the Government for the said parcel of land, and by divers other mesne conveyances the title thereto, so by him acquired, has come to the said defendant, Delinzo A. Walden, who purchased said lands of said Clark Irvine, in good faith, for a valuable consideration at the time of said purchase fully paid, and without
25 any knowledge or notice of the claim of the said railroad company, or its grantees or persons claiming under it, and

who, by virtue thereof, obtained the said title and became the owner of the said lands in fee; that at the time of the said entry and sale of the said parcel of land the same was subject to entry and sale at the land office at Beatrice, and had not been withdrawn from the market by the Secretary of the Interior, nor by any authority of the Government; that the Secretary of the Interior, through instructions to the register and receiver of the land office at Beatrice, did not withdraw the lands described in the said act of Congress from the market until the 15th day of April, A. D. 1870; nor was the same withdrawn from market, homestead or pre-emption entry, until said date.

V. And the defendant, for a further answer to the said complainant's said bill, saith: That the said certain indenture of mortgage made by the Saint Joseph & Denver City Railroad Company, of the first part, to the Farmers' Loan and Trust Company, of the second part, as set forth in the said complainant's bill, does not contain a description of, and was not made and executed as an incumbrance upon, the said parcel of land hereinbefore described, and the said mortgage was not executed or intended by the said Saint Joseph and Denver City Railroad Company, nor was it received or accepted by the said Farmers' Loan and Trust Company as a mortgage upon the said parcel of land; that the said mortgage was not filed or recorded in Thayer county, Nebraska, neither were the other conveyance-, under which the complainant claims title to said parcel of land, and that the complainant obtained no title or interest in the said parcel of land as against the defendant, under and by virtue of the said mortgage, and the said decree, sale, and subsequent conveyances to him and his grantors thereunder.

VI. And the said defendant, for a further answer to the said complainant's said bill, saith: That the said Clark Irvine, who entered and purchased said parcel of land from the United States,
26 as hereinbefore set forth, went into the occupation and possession thereof on the 8th day of April, 1870, and that he, with the subsequent grantees and grantors under him, with the defendant have ever since paid all taxes and assessments against the said land, and expended large sums of money in that behalf, and have made valuable and lasting improvements thereon in good faith and upon the belief that they held the title thereto in fee, and have been in the continuous and sole occupation and possession of the said parcel of land, and that the said cause of action set forth in the said complainant's said bill did not accrue to the said complainant and the respective grantors from whom he claims title in his said bill against the defendant within ten years next before the commencement of this suit.

And the defendant saith that he is ready and willing to maintain and prove, as this honorable court shall direct, all matters and things in this his answer set forth, and humbly prays to be hence dismissed with his reasonable costs and charges, in this behalf most wrongfully sustained.

And the defendant further humbly prays that in the event this

honorable court should grant the prayer of the said complainant in his said bill, and by a decree herein declare that the said patent was issued to and received by the said party hereinbefore referred to, and that he purchased and entered said parcel of land in trust for said company, and not otherwise, and that the title thereunder is now held by the said defendant in trust for the said complainant, and should further decree that the said defendant convey the said parcel of land to the said complainant, then that the defendant may demand and recover the value of all lasting and valuable improvements made on the said parcel of land, and of all taxes and assessments paid thereon,
and that such proceedings may be had in defendant's behalf
27 as provided by the statutes of Nebraska and the laws in force
for the relief of the defendant as an occupying claimant, and for such other and further relief as the defendant may be entitled to in equity.

DELINZO A. WALDEN,
Defendant,
By COLBY & HAZLETT,
Solicitors.

BROWN & MARSHALL,
Of Counsel.

STATE OF NEBRASKA, } *ss:*
County of Gage, }

Delinzo A. Walden, being first duly sworn, says: That he is the defendant in the above entitled action; that he has heard the foregoing answer read, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true.

D. A. WALDEN.

Subscribed in my presence and sworn to before me, this 1st day of January, A. D. 1881.

[SEAL] CHARLES O. BATES,
Notary Public, Gage County, Neb.

Upon the back of said answer appear endorsements, in words and figures following, to wit: No. 257 E. U. S. circuit court, district of Nebraska. Sherman W. Knevals *vs.* Delinzo A. Walden. Answer. Colby and Hazlett, solicitors for defendant. Brown and Marshall, of counsel. Filed Jan. 3d, 1881. Watson B. Smith, clerk.

Thereupon afterwards, to wit, on the said 10th day of January, 1881, exceptions were filed in said case, which said exceptions are in words and figures following, to wit:

Exceptions taken by the Plaintiff to the Answer of the Defendant to the Bill of Complaint in this cause for Impertinence.

In the United States Circuit Court, District of Nebraska.

28 SHERMAN W. KNEVALS *vs.* DELINZO A. WALDEN.

First exception. For that the said answer is impertinent in the matter alleged in the paragraph thereof marked II.

Second exception. For that the said answer is impertinent in the matter alleged in the paragraph thereof marked III.

Third exception. For that the said answer is impertinent in the matter alleged in the paragraph thereof marked IV.

Fourth exception. For that the said answer is impertinent in the matter contained in the paragraph thereof marked VI, as follows: "And that he, with the subsequent grantees and grantors under him, with the defendant have ever since paid all taxes and assessments against said land and expended large sums in that behalf."

Fifth exception. For that the said answer is impertinent in the matter alleged in the paragraph thereof marked VI.

In all which particulars this exceptant excepts to the said answer put in by the said defendant to the said bill of complaint as impertinent, and he humbly insists that the same ought to be expunged from the said answer.

J. M. WOOLWORTH,
Solicitor and of Counsel for Plaintiff.

Upon the back of said exceptions appear endorsements, in words and figures following, to wit: No. 257 E. United States circuit court, dist. of Nebraska. Sherman W. Knevals *vs.* Delinzo A. Walden. Exceptions. J. M. Woolworth, solicitor and of counsel for plaintiff. Filed Jan. 10, 1881. Watson B. Smith, clerk.

29 Thereupon, afterwards, at the January term of said court, on the 14th day of January, 1881, the following proceedings were had in said case, as appears of record on folio 689, Journal F, of said court:

SHERMAN W. KNEVALS *vs.* DELINZO A. WALDEN.

On motion of said plaintiff leave is hereby granted him to withdraw his exceptions to the answer filed herein, and to file his replication in five days. Case continued.

Thereupon, afterwards, to wit, on the 15th day of January, 1881, a replication was filed in said case, which said replication is in words and figures following, to wit:

The Replication of Sherman W. Knevals, Plaintiff, to the Answer of Delinzo A. Walden, Defendant.

In the Circuit Court of the United States in and for the District of Nebraska. In Equity.

SHERMAN W. KNEVALS *vs.* DELINZO A. WALDEN.

This repliant, saving and reserving to himself, now and at all times hereafter, all and all manner of benefit and advantage of exception which may be had or taken to the manifold insufficiencies of the said answer, for replication thereunto, say that they will aver, maintain, and prove his said bill of complaint to be true, certain and sufficient in the law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant; without this, that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed and avoided, traversed or denied, is true; all of which matters and things this repliant is, and will be, ready to aver, maintain, and prove as this honorable court shall direct, and humbly pray as in by his said bill of complaint he has already prayed.

JAMES M. WOOLWORTH,
Solicitor for Plaintiff.

Upon the back of said replication appear endorsements, in words and figures following, to wit: No. 257 E. U. S. circuit court, district of Nebraska. In equity. Sherman W. Knevals *vs.* Delinzo A. Walden. Replication. Filed January 15, 1881. Watson B. Smith, clerk. James M. Woolworth, solicitor for plaintiff.

Thereupon, afterwards, at the May adjourned term of said court, on the 15th day of June, 1881, the following proceedings were had in said case, as appears of record on folio 195, Journal G of said court

SHERMAN W. KNEVALS *vs.* DELINZO A. WALDEN *et al.*

On motion of said plaintiff, by Mr. Woolworth, his solicitor, leave is hereby given him to amend his bill, filed herein, by the insertion of the name of Samuel H. Gammun as a party defendant.

Thereupon, afterwards, to wit, on the 15th day of June, a subpœna in chancery was duly issued in said case, and on the 30th day of July returned, and filed, which said subpœna is in words and figures following, to wit:

UNITED STATES OF AMERICA, } ss:
District of Nebraska, }

31 The President of the United States of America to Samuel H. Gammun, impleaded with another, Greeting:

We command you, and each of you, that you appear before the judges of the circuit court of the United States for the district of Nebraska, at Omaha, on the first Monday in August next, it being the 1st day of August, A. D. 1881, to answer to the bill of complaint of Sherman W. Knevals, filed in the office of the clerk of said court January 13th, 1880, and then and there to receive and abide by such order and decree as shall then or thereafter be made, upon pain of the said bill being taken as confessed against you and decree pronounced accordingly.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Omaha, this 15th day of June, A. D. 1881, and of the Independence the 105th year.

[SEAL.] WATSON B. SMITH, *Clerk.*

Memorandum.

The above-named defendant is notified that unless he enters his appearance in the clerk's office of said court, at Omaha aforesaid, on or before the day to which the above writ is returnable, as above stated, the complaint will be taken against him as confessed, and a decree entered thereon accordingly.

WATSON B. SMITH, *Clerk.*

Attached to said subpœna in chancery is the return of the marshal, in words and figures following, to wit:

DISTRICT OF NEBRASKA, *ss:*

I hereby certify and return that on the 15th day of June, 1881, I received the within subpœna in chancery, and, after diligent search, I am unable to find the within-named defendant, Samuel H. Gammun, within my district.

32 ELLIS L. BIERBOWER,
United States Marshal for the District of Nebraska,
By GUSTAVUS STEVENSON,
Deputy United States Marshal.

Marshal's costs, $0.25.

Upon the back of said subpœna in chancery appear endorsements, in words and figures following, to wit: No. 257. Doc. E. Circuit court of the United States for the district of Nebraska. In chancery. Sherman W. Knevals *vs.* Delinzo A. Walden *et al.* Subpœna in chancery. Returnable to rule-day, first Monday in August, 1881. Watson B. Smith, clerk. Returned and filed July 30th, 1881. Watson B. Smith, clerk. J. M Woolworth, comp't's sol. S. E. ¼ & the S. E. ¼ N. E. ¼ sec. 25, T. 4, R. 2, in Thayer Co.

Thereupon, afterwards, to wit, on the 22nd day of November, 1881, an agreed statement of facts was filed in said case, which said agreed statement of facts are in words and figures following, to wit:

Agreed Statement of Facts.

In the Circuit Court of the United States for the District of Nebraska.

SHERMAN W. KNEVALS, Plaintiff,
vs.
DELINZO A. WALDEN, Defendant. } Stipulation.

It is hereby agreed between the parties hereto that the facts in this case are as follows:

1st. The act, a copy of which is hereto annexed, marked "A," was, on the 17th day of February, 1857, duly passed by the Legislative assembly of the Territory of Kansas, and approved by the Governor thereof.

The act, a copy of which is hereto annexed, marked "B," was, on the 6th day of March, A. D. 1862, passed by the Legislature and approved by the Governor of the State of Kansas.

33 And on the 17th day of April, 1862, a meeting of the stockholders of said company, duly called and convened, was held at Elwood, in the State of Kansas, at which the proceeding were had, set out in a copy of the records of said company, which is hereto annexed, marked "C."

At a meeting of the board of directors of said company, held at Elwood, on the 12th day of May, 1862, proceedings of said board were as the same appears by the record thereof, a copy of which is hereto annexed, marked "D."

On the 9th of October, 1866, at a meeting of the board of directors of said company, a resolution was passed, a copy of which is hereto annexed, marked "E."

On the 3rd day of February, 1870, at a meeting of the board of directors of said company, a resolution was passed, a copy of which is hereto annexed, marked "F."

On the 11th day of December, 1866, the paper, a copy of which is hereto annexed, marked "G," was filed in the office of the Secretary of the Interior.

2d. On the 23rd of July, 1866, Congress passed an act, a copy of which is annexed to the bill in this case.

3d. The engineer of said railroad company, having surveyed and staked out upon the ground the proposed line of said road, made a topographical map of the country through which said company proposed to build said line of road, showing the Government surveys and the proposed route of the road with reference to the section lines and the towns, counties, and rivers, which map was, on the 21st day of March, 1870, approved by the board of directors of said company, and on the 25th day of March, 1870, said map, with the certificates endorsed thereon showing the aforesaid action of the said directors

of the said company, was filed with the Secretary of the In-
34 terior, who accepted it, and who, in a reasonable time thereafter, in the due course of business, and in the performance of his duty, on the 28th of said month transmitted it to the Commissioner of the General Land Office, with a letter, a copy of which is hereto annexed, marked "H."

4th. In a reasonable time thereafter, and in the due course of business, on the 8th day of April, 1870, the said Commissioner, in the due performance of his duty, transmitted through the United States mail a letter of directions and instructions and a copy of said map to the register and receiver of the land office at Beatrice, a copy of which letter is hereto annexed, marked "I," which said letter duly arrived at said land office, and was received by the said register and receiver on the 15th day of April, 1870, and that on the receipt of the said letter and map at the said land office, and not till then, notice was publicly given by the said register and receiver that the lands purposed to be covered by said grant to the said railroad company were withdrawn from market, nor were said lands withdrawn from market until April 15, 1870, unless the filing of said map, as aforesaid, with the Secretary of the Interior, and his acceptance and approval thereof, and directions to the Commissioner of the General Land Office had such effect.

5th. That said company built and completed sections of said road from time to time until July 15th, 1872, when the same was completed to Hastings, where it made a junction with the Burlington and Missouri River railroad in Nebraska, but that said road has never been completed to any point on the Union Pacific railroad nor any branch thereof, unless it shall be held and construed that the Burlington and Missouri River railroad in Nebraska is a branch of the Union Pacific railroad.

The road so built was for some distance substantially upon the line delineated upon said map and ran through Thayer and
35 Nuckolls counties in Nebraska, which counties were within the district of lands subject to entry and sale at the land office at Beatrice aforesaid, but at a point about two miles west of the lands in question in this suit, and for some distance on each side of said point the said road as constructed departed from and was not built upon the proposed line as shown by the said map; and the road as built was distant from the proposed line shown on said map at the point opposite these lands in controversy from one to three miles, and deviated from the proposed line from one to three miles, as shown by said map, for the balance of the road.

Each section of ten miles of said road was built and completed within the time limited by said act of Congress, save only the first sixty miles from Elwood, Kansas, and the whole road to the junction with the Burlington and Missouri River railroad in Nebraska was completed within ten years from the date of said act. Neither the Marysville or Palmetto & Roseport Railroad Company, nor the St. Joseph and Denver City Railroad Company, commenced the construction of, or constructed, said road, or any part thereof, from Marysville or Palmetto City to Roseport, or from Marysville to Elwood, or

any branch thereof, until the 15th day of March, 1867; the road through Thayer and Nuckolls counties is more than one hundred miles west of Elwood. The road and line of said railroad, as actually constructed by said railroad company in Thayer county, was not surveyed and staked on the ground until November, 1870.

6th. As each consecutive section of said road, beginning at Elwood, was completed, the Governor of Kansas made the certificate required by said act in that behalf, and filed the same with the Secretary of the Interior.

And the plaintiff, by the deeds and proceedings mentioned in said bill, had, prior to the filing thereof, acquired all the title
36 which the said Saint Joseph and Denver City Railroad Company had at the time of said proceedings.

That the said mortgage given to the Farmers' Loan and Trust Company, mentioned in said bill, did not describe the land entered by defendant's grantor by the number or the part of the section, township, range, county, or State, but gave a general description and contained all lands granted to said railroad company by Congress in the manner aforesaid.

That the lands in controversy are within the ten miles of said railroad and the line of road as built, and also delineated on the map filed with the Secretary of the Interior, and when the said map was filed with the Secretary of the Interior no right of pre-emption or homestead had attached thereto, nor had the same been reserved by the United States for any purpose whatever, but the same were subject to pre-emption and homestead, and were in the market for sale at the said land office at Beatrice. Patents for most of the lands claimed by the plaintiff to have been granted by said act of Congress were issued to the said company in due course of business in the Land Department.

7th. On the 8th day of April, 1870, before any instructions or directions had been received from the Secretary of the Interior, the Land Department of the Government, at the land office at Beatrice withdrawing said lands from market, and without any actual personal knowledge or notice whatever that the said railroad company had filed with the Secretary of the Interior maps of its lines designating the route thereof, or that the said Secretary had directed the withdrawal of the said lands from the market, one Clark Irvin entered said lands and purchased the same of the United States at the land office at Beatrice, and paid therefor one dollar and twenty-five cents per acre, and complied with all the provisions of the
37 acts of Congress in that behalf required for obtaining title by entry and purchase of said lands, and therefore, in accordance with said entry and purchase of land, and without any knowledge or notice on his part of the rights or claims of the said railroad company, and without any protest, objection, or claim being made by him in that behalf by the said railroad company or any other person, a patent, on the 1st day of November, 1871, was duly issued to the said Clark Irvin therefor, which patent was duly filed in the office of the county clerk of Thayer county, Nebraska, and duly recorded in Book —, at page —, of deeds of the records of said county,

on the —— day of November, A. D. 1871. Long after the entry of said lands by the said Clark Irvin, and the issuance to him of a patent therefor, an application was made to the Land Department of the Government by said railroad company for the patent of said lands, with the tender of the necessary fees and charges, but it was refused, on the ground that the right of the said entry and patent of the same by the said Clark Irvin had attached thereto.

8th. On the —— day of ——, A. D. 1873, and not before, the said railroad company filed in the office of the secretary of State of Nebraska papers, copies of which are hereto annexed, marked A, B, C, D, E, and F, but did not otherwise comply, or attempt to comply, with the laws of that State in respect to foreign corporations extending their lines of road into said State, or with the laws of said State in regard to foreign railroad corporations, or with the laws of said State in regard to authorizing non-resident railroad companies to build roads in Nebraska.

9th. That the said mortgage described in said bill was never filed or recorded in said Thayer county, Nebraska; that on the —— day of April, A. D. 1873, the said Clark Irvin, by a good and sufficient warranty deed, for a valuable consideration, granted and conveyed said lands to this defendant, Delinzo A. Walden.

38 That the said defendant purchased said land in good faith, and without any notice that the plaintiff or his grantors, for a valuable consideration, then and at that time fully paid by him or said railroad company, had or claimed any interest in, claim upon, or title to, the said lands whatsoever.

That neither the said defendant nor the said Clark Irvin were parties to the said proceedings and foreclosure of the said mortgage to the Farmers' Loan and Trust Company, under which the plaintiff claims title to said lands.

That the said defendant and his said grantor have been in the peaceable occupation and possession of the said lands under said entry and patent and deed ever since the said 8th day of April, A. D. 1870, and have paid all taxes and assessments against said lands, and have made valuable and lasting improvements thereon in good faith, and upon the belief the defendant and his grantor were the absolute owners thereof.

10th. That the value of said lands in controversy exceeds the sum of five thousand dollars, and the matter in dispute, exclusive of costs, exceeds in value that sum.

J. M. WOOLWORTH,
Sol. for Pl'ff.
COLBY & HAZLETT,
Sol. for Def't.

An act to incorporate the Marysville or Palmetto and Roseport Railroad Company.

Be it enacted by the Governor and the Legislative Assembly of the Territory of Kansas, as follows:

SECTION 1. A company is hereby incorporated called the Marysville or Palmetto and Roseport Railroad Company, the capital stock

of which shall be five millions of dollars, to be divided into shares of one hundred dollars each, the holders of which, their successors and assigns, shall constitute a body corporate and politic, and by the name aforesaid shall have continual succession, may sue and be sued, plead and be impleaded, defend and be defended against, and may take and use a common seal, and shall be able in law and in equity to make contracts; may take, hold, use, possess, and enjoy the fee-simple or other title in and to any real estate, and may sell and dispose of the same; may make by-laws, rules, and regulations proper for carrying into effect the provisions of this act, and not repugnant to the Constitution and laws of the United States or of this Territory, and shall have the usual and necessary powers of companies for such purposes.

SEC. 2. Robert M. Stewart, W. P. Richardson, F. J. Marshall, Richard Rose, Bela M. Hughes, John W. Foreman, Willard P. Halla, M. Mitchell, Reuben Middleton, R. H. Jenkins, Fred. W. Smith, Geo. S. Wall, and W. S. Brewster shall constitute the first board of directors under this act, and shall hold their offices until their successors shall be qualified. They shall meet at such time as shall be designated by a majority of them and organize as a board of directors, and when organized they shall cause books to be opened for subscription to the capital stock of said company at such times and places as they or any five of them may designate, under the supervision of such person or persons as they may appoint, and may continue them open so long as they may deem proper, and may reopen such book when necessary until the whole stock shall be subscribed.

SEC. 3. As soon as five hundred shares shall be subscribed the directors shall cause an election to be held for not less than five nor more than nine directors, at such time and place as they may appoint, and give notice by publication in three newspapers published in this Territory.

SEC. 4. An election for directors shall be held on the second Tuesday of October in each year, and if not held on that day an election may be held at any other time that the directors may designate. The election shall be held under the supervision of one or more stockholders, and the person receiving the highest number of votes shall be elected, and shall continue in office till their successors be qualified. Every stockholder shall be entitled to one vote for each share held by him, and he may vote by proxy. Soon after their election the directors shall meet and elect one of their number president, who shall hold his office for the term for which he was elected director and until his successor shall be qualified.

SEC. 5. The directors shall appoint agents, clerks, engineers, superintendents, and other officers and servants for said company; shall keep a journal of their proceedings, and cause correct books and accounts to be kept; they may determine by by-laws what number of directors shall constitute a quorum, and may appoint committees and fill all vacancies in any office under said company; they shall fix the salary of the president and the officers and agents, but no director shall receive any compensation for his services as such; they

may take security from their officers and agents, and may adopt such measures and do such acts as may be best calculated to promote the prosperity and usefulness of said company.

SEC. 6. The directors shall make and advertise calls for the payment of the capital stock at such times and in such manner as they may deem proper; and if any stockholder shall fail to pay such requisition within ten days after the appointed time, the said company may declare the stock forfeited, and sell the same; and no delinquent stockholder shall vote in said company.

SEC. 7. The company shall have full power to survey, mark, locate, and construct a railroad from Marysville or Palmetto to Roseport, in the Territory of Kansas, so as to connect with the Hannibal and St. Joseph Railroad; and for that purpose may hold a strip of land not exceeding one hundred feet wide, and may also hold
41 sufficient land for the construction of depots, warehouses, and water stations, and may select such route within the valley or ravine, and may extend branch railroad to any point in any counties in which said road may be located.

SEC. 8. Said company may take voluntary relinquishments of the right of way for said road, and the necessary water-stations and depots; and if the land through which such road shall pass shall belong to minors, in whole or in part, the guardian or curator of such minors shall have power to convey to said company so much of the land as may be necessary for the purpose aforesaid, on fair and equitable terms; but every such conveyance by a guardian shall be subject to the approval or rejection of the probate or county court in which guardianship is pending.

SEC. 9. Any company shall have power, by themselves or agents, to enter and take from any lands in the neighborhood of the line of their railroad earth, gravel, stone, wood, water, or other material necessary for the construction of said road; also, for the purpose of depositing thereon earth, stone, gravel, coal, wood, &c., and for the purpose of procuring water for their uses may lay pipes, erect pumps, dams, and reservoirs, and maintain and keep the same in repair, paying, if the owner of said lands and the company can agree, the damages they shall do to said lands or its appurtenances; and if the parties cannot agree, the damages will be decided and paid for as hereafter provided.

SEC. 10. If any owner of any tract of land through which said railroad shall pass shall refuse to relinquish the right of way for said road for said company, or if the persons be infants, or persons of unsound mind, or non-residents of the Territory, the facts of the case shall be specifically stated to the judge of the district or
42 probate court of the county in which the lands or materials are situated, and said judge shall appoint three disinterested citizens of the county to view said lands and materials, who shall take into consideration the value of the land, earth, gravel, stone, wood, or other material necessary for the construction of said road, and the advantages and the disadvantages of the road to the same, and shall report, under oath, what damages will be done to said land or any improvement thereon, stating the amount of the damages

assessed, and shall return a plat of the land thus condemned: Notice of such application to such judge shall be given to the owner of such land and materials five days before the making of the application, if such owner reside in this Territory, or to his guardian; and if such owner be a non-resident of this Territory, he may be served with actual notice, or by an advertisement for four weeks in some newspaper.

SEC. 11. The persons appointed to view and value such lands and materials shall file their report and plat in the office of the clerk of the district or probate court in which the land or part thereof is situated; and if no valid objection be made to said report, the court shall enter judgment against said company for the amount of damages so assessed, and shall make an order vesting in said company the fee-simple title of the land in such plat and report described. Objections to such report must be filed within ten days after the same shall be filed, which objections shall be examined by such judge in term time or vacation, and he may hear testimony, and by judgment confirm said report, or may set the same aside and appoint three other viewers who shall proceed in the same manner, and make their report until a report shall be confirmed.

In all such cases the court shall have power to make such order and take such other steps as will promote the ends of justice between the owners of such land and materials and the said company.

SEC. 12. Said company may build said road along or across
43 any territorial or county road, or the streets or wharves of any town or city, and any stream or highway; but whenever said railroad shall cross any territorial or county road, said company shall keep good and sufficient causeways or other adequate facilities for crossing the same; and said railroad shall not be so constructed as to prevent the public from using any road, street, or highway along or across which it may pass; and when said railroad shall be built across any navigable stream said company shall erect a bridge sufficiently high on which to cross, or shall construct a draw-bridge so that in no case shall the free navigation of such stream be obstructed.

SEC. 13. Said company shall commence the construction of said road within seven years, and shall complete the same in ten years thereafter, and said company shall have general powers to use, manage, control, and enjoy said road; shall determine what kind of carriages shall be used thereon, and by whom and in what manner; and shall determine the terms, conditions, and manner in which merchandise, property, and passengers shall be transported thereon; and shall have power to construct and keep such turn-outs, gates, bridges, culverts, toll-houses, depots, and warehouses, causeways, and other buildings, machinery, and fixtures as may be necessary.

SEC. 14. Dividends of the profits of said company shall be made annually, or oftener, if necessary; but the directors may reserve or set apart a portion of the profits as a contingent fund to meet expenditures and losses.

SEC. 15. At any annual meeting of said company the directors

shall make to the stockholders an exhibit of the affairs and condition of the company; one-seventh part of the interest of all the stockholders may call a meeting by giving four weeks' notice in one newspaper printed in the Territory.

SEC. 16. When said road shall be completed, the company shall file a plat thereof in the office of the secretary of the Territory
44 or State, as the case may be; and the Legislature may, at any time, require a statement from the company as to the process of work, the amount of business, and the receipts of the company, and the books and accounts may, at any time, be investigated by a committee appointed by the Legislative Assembly.

SEC. 17. When any person shall cease to be a stockholder he shall cease to be a member of the company.

SEC. 18. If any person shall willfully injure, obstruct, or destroy said railroad, or shall break, destroy, or deface any work, edifice, or other fixture or improvement belonging to said company, he shall be considered guilty of a criminal offense, and shall be punished in such manner as shall be prescribed by law, and shall also be liable to said company for all damages by it sustained.

SEC. 19. The operations of said company shall be confined to the general business of locating, constructing, managing, and using said road, and the acts necessary or proper to carry the same into complete and successful operation, and for such purposes and not other. Said company shall have power to extend their capital, receive loans, grants, and donations of land, money, or bonds in any quantity from this Territory or from the United States, and may sell, convey, pledge, mortgage, or otherwise dispose of said lands, or any part thereof, and apply the proceeds to the construction of said road and branches for the benefit of the company.

SEC. 20. That so much of the provisions of section thirteen of article first of an act, entitled "An act concerning corporations," as relates to stocks owned by incorporated companies, shall not apply to this act.

This act to take effect and be in force from and after its passage.

45 "B."

Chapter CLXX. (Session 1862.)

An Act Relating to Railroad Companies.

Be it enacted by the Legislature of the State of Kansas:

1. Any railroad company now organized, or which shall hereafter organize, under the laws of Kansas may, at any meeting regularly called of all the stockholders thereof, by vote of persons holding a majority of the stock of such company, unite and consolidate it with any other company or companies now organized, or which may be hereafter organized, under the laws of the United States or of any State or Territory by the consent of the company with which it may be consolidated, and such company or companies with which it shall so unite or consolidate may hold, use, and enjoy all the rights and

privileges conferred by the laws of Kansas on the company or companies uniting or consolidating with it, and shall be liable for all the debts and own all the property and franchises of such company or companies: Provided, That any companies thus united for the purpose of the construction of a railroad and branches thereof from the western boundary of the State of Missouri to Pacific Ocean shall upon equal terms have the right to run through cars upon said Pacific railroad as far and as fast as the same is completed from the points on the Missouri river from which said roads or branches shall start, or where such roads or branches shall cross said river; and that such road or branches shall have the right to connect with said Pacific railroad at such points as may be determined by the respective roads or branches; and that such roads or branches shall share equally in the proceeds of any public lands which may be hereafter ceded or granted by any treaty with any Indian tribe or by any act of Congress, to aid in the construction of any or of all such roads; but this amendment shall not apply to the lands
46 already by treaty ceded by the Pottawatomie Indians by a treaty now pending in the United States Senate, such proceeds to be applied in proportion to the length of the line of each road from the respective points on the Missouri river where such roads shall start or cross the same to the point of connection; and that such branches shall have the right to transport passengers and freight upon through cars, or otherwise, upon equal terms, and to enjoy equal facilities in respect to contracts for freight or passengers on such Pacific railroad in every respect.

SEC. 2. Any railroad company now organized, or which may hereafter organize, under the laws of the State or Territory of Kansas shall have the right to construct and operate along its proposed route a line of telegraph as soon as the work of construction of such road shall have been commenced, with all the rights, privileges, and franchises given to any telegraph company under any law of the State or Territory of Kansas.

SEC. 3. Any such railroad company, by vote of persons owning a majority of its stock, at any meeting regularly called of all the stockholders of said company, may change its corporate name or the number of its directors at pleasure, and may in like manner make valid and effectual any acts done in good faith, and may cause to be done any acts omitted affecting the organization of affairs of said company or the continuance of its charter, though such acts may have been done or omitted contrary to the regulations of such company or the requirements of law: Provided, The time given by law to such railroad company within which to commence the construction of its road shall not be hereby extended.

SEC. 4. Any railroad company now organized under the laws of the State or Territory of Kansas may extend their — and construct the same still further in the same general direction, under
47 the same restrictions now embodied in their charters, and may increase their capital at the rate of $15,000.00 per mile for every mile so constructed.

SEC. 5. Any railroad now organized under the laws of the State or

Territory of Kansas may receive subscriptions to the capital stock of their road in lands, lots, houses, or any personal property, at such valuation as may be agreed upon with the party or parties; and the company may sell, mortgage, [or] pledge such real personal property to raise money or materials for constructing, equipping, or operating said road.

SEC. 6. For the purpose of enabling any company to construct, equip, and operate their road, they are hereby authorized to pledge or mortgage said road, rolling stock, machinery, depots, and other property they possess, together with the franchise of said road, for the liquidation of any indebtedness said railroad company may incur in the construction of said road.

SEC. 7. All deeds for the conveyance of real estate of said company shall be signed by the president of said company and attested by the secretary, with the corporate seal attached, which shall be deemed and held sufficient execution, authentication, and acknowledgment of such deeds in all courts.

SEC. 8. This act shall take effect and be in force from and after its publication; and the secretary of State is directed to cause it to be published immediately after its passage.

48 EXHIBIT "C."

ELWOOD, *April 17th*, 1862.

Pursuant to notice, a meeting of the stockholders of the Marysville or Palmetto and Roseport Railroad Company was held at the Great Western Hotel on Thursday, the 17th day of April, 1862. The meeting was called to order, and Frederick W. Smith was appointed chairman of the meeting.

On motion, John Corby was elected secretary.

The following named persons received the number of votes opposite their respective names:

Thomas Harbine	1,004 votes.
John Corby	1,004 "
Willard P. Hall	1,004 "

St. Joseph:

William Pridenbaugh	1,004 "
William K. Richardson	1,004 "
William Fowler	1,004 "
E. Blackiston	1,004 "

Elwood:

G. S. Hough	1,004 "
A. L. Lee	1,004 "

And each of the above named gentlemen having received a majority of the votes polled at said election, they were declared duly elected directors of said company for the ensuing year.

Pursuant to notice, the stockholders of said Marysville or Palmetto and Roseport Railroad Company were required to give their assent or dissent on the propriety of changing the name of said corporation to that of the St. Joseph and Denver City Railroad Company, and upon counting up the vote present there appeared in favor of the change in the name or title of said Marysville or Palmetto or Roseport Railroad Company one thousand and four votes, the same being a majority of the shares of stock owned in said company. Against said change of name there was no dissent.

(Sig.) JOHN CORBY, *Secretary.*

49 EXHIBIT "D."

ELWOOD, *May 12th*, 1862.

A meeting of the directors of the Marysville or Palmetto and Roseport Railroad Company, elected at a meeting of the stockholders of said railroad company on the 17th of April, 1862, convened at the Great Western Hotel, in the city of Elwood, State of Kansas, on the 12th day of May, 1862. There was present Thomas Harbine, John Corby, W. K. Richardson, Wm. Ridenbaugh, E. Blackiston, and G. S. Hough, which being a majority of the board-elect, proceeded to the transaction of business. On motion, W. K. Richardson was appointed chairman, and John Corby secretary. An election for president was entered into, and Thos. Harbine was unanimously elected as president. John Corby was unanimously elected secretary.

Mr. Ridenbaugh offered the following resolution:

"Whereas the stockholders of the Marysville or Palmetto and Roseport Railroad Company, at a regularly-called meeting of all the stockholders, met at the Great Western Hotel, in the city of Elwood, State of Kansas, on Thursday, the 17th of April, 1862, among other proceedings, unanimously voted to change the name of the said Marysville or Palmetto and Roseport Railroad Company to that of the Saint Joseph and Denver City Railroad Company; and whereas the authority to make such change of title was vested in said stockholders by virtue of the third section of an act of the Legislature of the State of Kansas entitled 'An act relating to railroad company,' and approved March 5th, 1862, where said third section is in the following words: 'Any such railroad company, by vote of persons owning a majority of its stock, at any meeting regularly called of all the stockholders of such company, may change its corporate name or the number of its directors at pleasure, and may, in like manner, make valid and effectual any act done in good
50 faith, and may issue any acts omitted affecting its organization, or the affairs of such company, or the continuance of its charter, though such acts may have been done or omitted contrary to the regulation of such company or requirements of law, provided that the time — is given by law to such railroad company within which to commence the construction of its road shall not be extended:'

Therefore, be it resolved, That the name and style of said ——— be, and shall hereafter be, known by that of the St. Joseph and Denver City Railroad Company, and that all contracts or obligations made by said Marysville or Palmetto and Roseport Railroad Company shall be, and the same are hereby, recognized as valid and binding upon the St. Joseph and Denver City Railroad Company; which was unanimously adopted.

(Si'g) JOHN CORBY, *Secretary.*

EXHIBIT "E."

Whereas the 39th Congress of the United States passed an act granting to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, every alternate section of land designated by odd numbers, for ten sections in width on each side of each road, to the point of intersection with the Union Pacific railroad or any branch thereof, which act is in the words and figures following, to wit:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Elwood, in Kansas, westwardly *via* Marysville, in the same State, so as to effect a junction
51 with the Union Pacific railroad or any branch thereof not further west than the one hundredth meridian of west longitude, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection.

But in case it shall appear that the United States have, when the line of the route of said road is definitely fixed, sold any section, or any part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid, which lands thus indicated by odd numbers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid:

Provided, further, That the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same and for no other purpose whatever, and shall be disposed of only as in this act hereinafter provided:

Provided, also, That no part of the land granted by this act shall

be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land or bonds have been made by Congress:

And provided, further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner
52 by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operations of this act, except as far as it may be found necessary to locate the route of said road through said lands, in which case the right of way for one hundred feet on each side of said road only shall be granted subject to the approval of the President of the United States.

SEC. 2. And be it further enacted, That the sections and part of sections of land which, by such grant, shall remain to the United States within ten miles of each side of said road shall not be sold for less than double the minimum price of public lands when sold, nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder, or above the increased minimum price as aforesaid:

Provided, That actual and *bona fide* settlers, under the provisions of the pre-emption and homestead laws of the United States, may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid:

And provided, also, That settlers on any of said reserved sections, under the provisions of the homestead law, who improve, occupy, and cultivate the same for a period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SEC. 3. And be it further enacted, That the grant of lands hereby made is upon condition that the said company, after the construction of its road, shall keep it in repair and in use, and shall at all times be in readiness to transport troops, munitions of war, supplies, and public stores upon its road for the Government when
53 required to do so by any department thereof, the Government at all times having the preference in the use of the road for all the purposes aforesaid, at fair and reasonable rates of compensation, not exceeding that paid by private individuals, or the average paid for like service on other roads; and the lands hereby granted, held and reserved as aforesaid, shall enure to the benefit of said company, as follows:

When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road, in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land hereinbefore granted as lie opposite to and coterminous with the said completed sections, and when certificates of the Governor aforesaid shall be presented to said Secretary of the completion as aforesaid of each successive section of ten con-

secutive miles of said road, the said Secretary shall in like manner issue to said company patents for the said sections of said land as aforesaid for each of said sections of road until said road shall be completed: Provided, That if said railroad company or its assigns shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its right to the lands for said section so failing of completion shall revert to the Government of the United States: Provided, further, That if said road is not completed within ten years from the date of the acceptance of the grant hereinafter made, the lands remaining unpatented shall revert to the United States.

SEC. 4. And be it further enacted, That as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof it shall be the duty of the
54 said Secretary to withdraw from the market the lands granted by this act in such manner as may be best calculated to effect the purpose of this act and subserve the public interest.

SECTION 5. And be it further enacted, That the United States mail shall be transported on said road, and its extension, under the direction of the Post Office Department, at such price as Congress may, by law, provide:

Provided, That, until such price is fixed by law, the Postmaster General shall have power to fix the compensation.

SECTION 6. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said St. Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof; said way is granted to said railroad to the extent of one hundred feet in width on each side of said road, where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations.

SECTION 7. And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the said St. Joseph and Denver City Railroad Company, shall be signified in writing under the corporate seal of said company, duly executed, pursuant to the direction of its board of directors, first had and obtained; which acceptance shall be made within six months after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

Approved July 23, 1866.

Therefore, resolved by the president and directors of the St. Joseph and Denver City Railroad Company, at a meeting held in
55 Elwood, Doniphan county, Kansas, on the 9th day of October, 1866, of the directors of said company, That we do hereby accept the terms, conditions, and impositions of said act of Congress, entitled "An act for a grant of land to the State of Kansas to aid in

the construction of the Northern Kansas railroad and telegraph. Approved July 23, 1866."

And that the president and secretary of said company cause to be filed with the Secretary of the Interior, under the seal of said corporation, a certified copy of this resolution, and of the proceedings of said corporation accepting the terms, conditions, and impositions contained in said act.

EXHIBIT "F."

Whereas the Legislature of Kansas did heretofore pass an act entitled "An act to incorporate the Marysville or Palmetto and Roseport Railroad Company, which said act was approved February 17th, 1857; and whereas afterwards, to wit, on the 12th day of May, 1862, the name of the Marysville or Palmetto and Roseport Railroad Company was changed to that of the Saint Joseph and Denver City Railroad Company, in accordance with the provisions of an act of the Kansas Legislature entitled "An act relating to railroad companies," approved March 5th, 1862; and whereas the said St. Joseph and Denver City Railroad Company is desirous of extending its railroad from said town or city of Marysville into the State of Nebraska, so as to make a connection with the Union Pacific railroad at or near Kearney, in the State of Nebraska, and to that end wishes to avail itself of the provisions of an act of the State of Nebraska entitled "An act to authorize non-resident roilroad companies to build roads in Nebraska," approved February 12th, 1869; and whereas the said St. Joseph and Denver City Railroad Company were, at the date of the passage of said last-recited act, and long prior thereto, a rail-
56 road company organized under the laws of the State of Kansas:

Therefore, be it resolved, That the president of this company be, and he hereby is, authorized and directed to proceed without delay and file a true copy of the articles of incorporation of this company with the secretary of State of Nebraska, and to do and perform for this company all other acts and things, and to file all other papers in the proper offices in the State of Nebraska necessary to secure to this company all the rights and privileges and provisions of said act of said State of Nebraska.

Resolved, That this company will keep an office at Jenkins' Mills, in the county of Jefferson, in the State of Nebraska, till otherwise ordered, said county being a county in which it is supposed that the railroad company shall be, in pursuance of the provisions of said act of said State of Nebraska.

Resolved, That the railroad of this company shall pass through and into the following counties in the said State of Nebraska, to wit, Jefferson, Fillmore, Nuckolls, Clay, Adams, and Kearney.

EXHIBIT "G."

Acceptance of the terms, conditions, and impositions of an act of the 39th Congress, entitled An act for the grant of land to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph.

Whereas, by an act of the 39th Congress, entitled An act for the grant of lands to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph, approved July 23d, 1866, there was granted to the State of Kansas, for the use and
57 benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Elwood, in Kansas, westwardly *via* Marysville, in the same State, so as to effect a junction with the Union Pacific railroad, or any branch thereof, ten sections of land on each side of said road to the point of intersection; and whereas, on the 9th day of October, A. D. 1866, the following proceedings were adopted at a meeting of the directors of said road:

"Whereas the 39th Congress of the United States passed an act granting to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, every alternate section of lands designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection with the Union Pacific railroad, or any branch thereof, which act is in the words and figures following, to wit:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That there is hereby granted to the State of Kansas, for the use and benefit of the St. Joseph and Denver City Railroad Company, the same being a corporation organized under the laws of the State of Kansas to construct and operate a railroad from Elwood, in Kansas, westwardly *via* Marysville, in the same State, so as to effect a junction with the Union Pacific railroad, or any branch thereof, not further west than the one hundredth meridian of west longitude every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection.

But in case it shall appear that the United States have, when the line of the route of the said road is definitely fixed, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States
58 for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purpose aforesaid, from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or part of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the rights of pre-emption or homestead settlements have attached as aforesaid, which lands thus indicated by odd num-

bers, and selected by direction of the Secretary of the Interior as aforesaid, shall be held by the State of Kansas for the use and purpose aforesaid: Provided, That the land to be so selected shall in no case be located further than twenty miles from the line of said road:

Provided, further, That the lands hereby granted for and on account of said road shall be exclusively applied in the construction of the same, and for no other purpose whatever, and shall be disposed of only as in this act hereinafter provided:

Provided, also, That no part of the land granted by this act shall be applied to aid in the construction of any railroad, or part thereof, for the construction of which any previous grant of land or bonds have been made by Congress:

And provided, further, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be, and the same are hereby, reserved to the United States from the operation of this act, except as far as it may be found necessary to locate the route of said road through said lands, in which case the right of way for one hundred feet on each side of said road only shall be granted, subject to the approval of the President of the United States.

SECTION 2. And be it further enacted, That the sections and
59 parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands when sold; nor shall any of said lands become subject to sale at private entry until the same shall have been first offered at public sale to the highest bidder at or above the increased minimum price, as aforesaid:

Provided, That the actual and *bona fide* settlers under the provisions of the pre-emption and homestead laws of the United States may, after due proof of settlement, improvement, cultivation, and occupation, as now provided by law, purchase the same at the increased minimum price aforesaid:

And provided, also, That settlers on any of said reserved sections under the provisions of the homestead law who improve, occupy, and cultivate the same for the period of five years, and comply with the several conditions and requirements of said act, shall be entitled to patents for an amount not exceeding eighty acres each, anything in this act to the contrary notwithstanding.

SECTION 3. And be it further enacted, That the grant of lands hereby made is upon condition that the said company, after the construction of its road, shall keep it in repair and use, and shall at all times be in readiness to transport troops, munitions of war, supplies, and public stores upon its road for the Government when required to do so by any department thereof, the Government at all times having the preference in the use of the road for all the purposes aforesaid at fair and reasonable rates of compensation, not exceeding that paid by private individuals for like services on other roads. And the lands hereby granted, held, and reserved as aforesaid

shall inure to the benefit of said company as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner as a first-class railroad, then the Secretary of the Interior shall issue to the said company patents for so many sections of said land hereinbefore granted as lie opposite to, and coterminous with, the said completed sections, and when certificates of the Governor aforesaid shall be presented to the Secretary, of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the said sections of said lands, as aforesaid, for each of said sections of road until said road shall be completed: Provided, That if said railroad company, or its assigns, shall fail to complete at least one section of said road each year from the date of its acceptance of the grant provided for in this act, then its right for the lands for said section so failing of completion shall revert to the Government of the United States: Provided, further, That if said road is not completed within ten years from the date of the acceptance of the grant hereinafter made, the lands remaining unpatented shall revert to the United States.

SECTION 4. And be it further enacted, That as soon as the said company shall file with the Secretary of the Interior maps of its line designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purpose of this act and subserve the public interest.

SECTION 5. And be it further enacted, That the United States mail shall be transported on said road and its extension, under the direction of the Post Office Department, at such price as Congress may by law provide: Provided, That until such price is fixed by law, the Postmaster General shall have power to fix the compensation.

SECTION 6. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said St. Joseph and Denver City Railroad Company, its successors and assigns, for the construction of a railroad as proposed, and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of the road where it may pass through the public domain; also, all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations.

SECTION 7. And be it further enacted, That the acceptance of the terms, conditions, and impositions of this act by the St. Joseph and Denver City Railroad Company shall be signified in writing under the corporate seal of the said company, duly executed pursuant to the directions of its board of directors, first had and obtained; which acceptance shall be made within six months after the passage of this act, and not afterwards, and shall be deposited with the Secretary of the Interior.

Approved July 23d, 1866.

Therefore, resolved, by the president and directors of the St. Joseph and Denver City Railroad Company, at a meeting held in Elwood, Doniphan county, Kansas, on the 9th day of October, A. D. 1866, of the directors of said company, That we do hereby accept the terms, conditions, and impositions of said act of Congress, entitled "An act for a grant of land to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph," approved July 23, 1866; and that the president and secretary of said company cause to be filed with the Secretary of the Interior, under the seal of said corporation, a certified copy of this resolution and of the proceedings of said corporation accepting the terms, conditions, and impositions of said act.

Now, therefore, we, Thomas J. Chew, Jr., president, and
62 John Corley, secretary, of the St. Joseph and Denver City Railroad Company, do hereby certify that the above and foregoing is a true and correct copy of an act to aid in the construction of said railroad and telegraph, and of the proceedings of said St. Joseph and Denver City Railroad Company accepting the terms, conditions, and impositions of said act of Congress.

In testimony whereof, we do hereby sign our names as president and secretary of said corporation and have hereunto attached the seal of the St. Joseph and Denver City Railroad Company, this second day of November, 1866.

[SEAL.] T. J. CHEW, JR.,
President of the St. Joseph and Denver City Railroad Company.
JOHN CORLEY,
Secretary of the St. Joseph and Denver City Railroad Company.

EXHIBIT "H."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., *March 28th*, 1870.

SIR: I transmit herewith a map of the definite location of the line of road of the Saint Joseph and Denver City Railroad Company from Elwood, in Kansas, *via* Marysville, in said State, to a connection with the Union Pacific railroad at the southeast corner of section 36, in township 9 north, of range 16 west, in the State of Nebraska. You will instruct the proper local officers to withhold from sale or other disposal all the odd numbered sections falling within the limits of twenty miles on each side of the line of road. In thus directing the land to be withdrawn conformably to the 4th section of the act of July 23, 1866, I deem it proper, in order to avoid any misapprehension as to the views of the Department, to state that this order
63 is made without prejudice to any existing adverse rights, whether individual or corporate, if such there be, and does not include any lands "heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvements or for any other purpose whatsoever." In case of such reservation to said company there is granted only a right of way for one hundred feet on each side of their line of road, subject to the approval of the

President of the United States. The right of said company to construct their road within the limits of the State of Nebraska may hereafter be the subject of controversy; in that event nothing contained in this order will preclude the consideration of the question as to such right should it arise in such form as to require the action of the Department.

Very respectfully your ob't servant, J. D. COX,
Secretary.

Hon. Jos. S. WILSON,
Com'r of the Gen'l Land Office.

EXHIBIT "I."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE, *April 8th*, 1870.

REGISTER & RECEIVER, *Beatrice, Nebraska.*

GENTLEMEN: I herewith transmit to you a map showing the line of definite location of the St. Joseph and Denver City railroad and the ten and twenty-mile limits of the land grant made thereto under the act of July 23, 1866. You are hereby directed to withdraw from sale or location, pre-emption or homestead entry, all the odd numbered sections falling within those limits, and to increase in
64 price $2.50 per acre all the even numbered sections within the 10-mile limit, and dispose of the same under the pre-emption and homestead laws only, and at that ratability, except in cases of settlement made prior to this withdrawal, in which case you will permit the parties, in virtue of the act of March 27th, 1854, to prove up and pay for their claims upon either odd or even sections at the rate of $1.25 per acre, in accordance with the rules and regulations prescribed by the enclosed circular, dated Feb'y 10, 1870.

The even numbered sections outside of the ten-mile limits are not affected by this letter.

The instructions herein given will take effect from the date of the receipt at your office, and I have to request that you will acknowledge the same by date.

Very respectfully, JOS. S. WILSON,
Commissioner.

Upon the back of said agreed statement of facts appear endorsements, in words and figures following, to wit: No. 257 E. In the circuit court of the United States for the district of Nebraska, Sherman W. Knevals *vs.* Delinzo A. Walden *et al.* Statement of facts agreed upon. Filed Nov. 22, 1881. Elmer D. Frank, clerk.

Thereupon, afterwards, at the November term of said court, on the 23d day of November, 1881, the following proceedings were had in said case, as appears of record, on folio 387, Journal G of said court.

SHERMAN W. KNEVALS *vs.* DELINZO W. WALDEN *et al.*

This day come the parties by their attorneys, and this case
65 being regularly called for action it is agreed by counsel, and submitted to the court on agreed statement of facts, and the same is taken under advisement.

Thereupon, afterwards, to wit, on the 21st day of January, 1882, an order of the circuit judge was filed in said case, which said order is in words and figures following, to wit:

In the Circuit Court United States, District of Nebraska. January Term, 1882.

SHERMAN W. KNEVALS
vs.
D. A. WALDEN *et al.* } Equity.

In this case I hold that upon the facts as agreed upon complainant is entitled to a decree in accordance with the prayer of the bill. I have not time at present to write an opinion, but this is not important, since the main question was decided by Mr. Justice Miller, in Knevals *vs.* Hyde, 5 Dillon, 469. I have carefully considered argument of counsel for the respondents upon points not covered by that case, and find nothing in them which defeats this complainant's right of recovery. Decree may be entered for complainant without prejudice to the right of respondent to claim pay for improvements, unless counsel otherwise agree. Appeal allowed and bond for costs fixed at $1,000.

Jan'y 19, 1882. GEO. W. McCRARY,
Circuit Judge.

Upon the back of said order appear endorsements, in words and figures following, to wit: No. 257 E. Knevals *vs.* Walden. Order. Filed Jan. 21, 1882. Elmer D. Frank, clerk. McCrary, circuit judge.

Thereupon, afterwards, at the January term of said court, on the 21st day of January, 1882, the following proceedings were had in said case, as appears of record on folio 498, Journal G of said court:

66 SHERMAN W. KNEVALS
vs.
DELONZA A. WALDEN & SAMUEL H. GAMMON.

This cause came on to be heard before his honor the circuit judge, the Honorable George W. McCrary, at the November term, 1881, of this court upon the pleadings, agreed statement of facts, and exhibits, and was argued by counsel, and the said judge took the same under advisement and for the consideration thereof, and at this day he filed his opinion and order in writing, whereby he directed a decree to be entered for the plaintiff according to the prayer of his bill, whereupon it is ordered, adjudged, and decreed as follows, that is to say:

1. It is hereby declared that on the 25th day of March, 1870, the line of route of the Saint Joseph and Denver City Railroad Company was definitely fixed, and the grant to the State of Kansas to aid the construction of its railroad, made by the act of Congress in the said bill, entitled the title whereof, was "An act for a grant of land to the State of Kansas —— railroad and telegraph," approved June 23rd, 1866, became located and operative, so that upon the construction of its road in manner prescribed by said act, and the advertisement thereof to the Secretary of the Interior therein required, the said Saint Joseph and Denver City Railroad Company became and was entitled to a patent for the land in question in this suit, that is to say, the southeast quarter and the southeast quarter of the northeast quarter of section twenty-five, in township four, range two, in Thayer county, and State of Nebraska; that the patent of the United States for said lands was issued to another party in trust for said company and not otherwise, and the title thereto is now held by the defendant Walden under said party and in trust
67 for the plaintiff in this suit.

2. It is therefore decreed that by an instrument of conveyance, in form to be approved by Dwight G. Hull, one of the masters of this court, the said defendants, within thirty days from the date of this decree, convey the above-described parcel of land to the said plaintiff, and if they fail so to do, the said master make such deed in their behalf to said plaintiff, and upon the production of such deed, whether made by the parties or by the said master, the said defendants surrender and deliver possession of the said premises to the said plaintiff.

3. The above order and decree is subject to whatever rights the said defendant Walden may have as an occupying claimant of said premises under the laws of this State and without prejudice thereto, which rights may be hereafter alleged by the said defendant in such manner as he may be advised.

4. It is ordered that the said plaintiff recover against said defendants his costs of this suit, to be taxed by the clerk.

5. The defendants thereupon, in open court, prayed an appeal to the Supreme Court of the United States, which is allowed, and his bond on appeal is fixed at $1,000.

(Signed) ELMER S. DUNDY, *Judge.*

Thereupon, afterwards, to wit, on the 24th day of March, 1882, a bond was filed in said case, which said bond is in the words and figures following, to wit:

68 Know all men by these presents, that we, Delinzo A. Walden and H. A. LaSelle and Nathan Blakely and J. E. Smith, are held and firmly bound unto Sherman W. Knevals in the full and just sum of one thousand ($1,000) dollars, to be paid to the said Sherman W. Knevals' certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 24th day of January, in the year of our Lord one thousand eight hundred and eighty-two (1882).

Whereas lately, at a circuit court of the United States for the district of Nebraska, in a suit depending in said court between Sherman W. Knevals and Delinzo A. Walden, a decree was rendered against the said Delinzo A. Walden, def't, and the said Delinzo A. Walden having prayed an appeal to the Supreme Court of the United States, which was allowed:

Now, the condition of the above obligation is such, that if the said Delinzo A. Walden shall prosecute her appeal to effect, and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

DELINZO A. WALDEN.
H. A. LASELLE.
NATHAN BLAKELY.
J. E. SMITH.

Attest:
ALFRED HAZLETT.

Approved by—
ELMER S. DUNDY, *Judge.*

[Endorsed:] No. 257 E. United States circuit court, district of Nebraska. Sherman W. Knevals *vs.* Delinzo A. Walden. Bond. Filed March 24, 1882. Elmer D. Frank, clerk, by F. E. McCrary, dep't.

69 DISTRICT OF NEBRASKA, *ss:*

I, Elmer D. Frank, clerk of the circuit court of the United States for the eighth circuit and district of Nebraska, do hereby certify that the foregoing folios, from one to —, contain true and faithful transcripts of all pleadings and proceedings of record and on file in my office as said clerk, and the whole thereof and the endorsements thereon in case of Sherman W. Knevals *vs.* Delinzo A. Walden *et al.*

Witness my hand and the seal of said circuit court, at Omaha, this 11th day of May, A. D. 1882.

[SEAL.] ELMER D. FRANK, *Clerk.*

Endorsed on cover: Nebraska C. C. U. S. No. 220. Delinzo A. Walden, appellant, *vs.* Sherman W. Knevals. Filed 5th June, 1882.

OFFICE SUPREME COURT U.S.
FILED
APR 19 1913
JAMES H. McKENNEY, Clerk.

114-373

IN THE

Supreme Court of the United States.

DELINZO A. WALDEN
vs.
SHERMAN W. KNEVALS.

To the Honorable the Supreme Court of the United States of America:

Appellant claims motion should be denied, because:

First. He desires and has a right to the judgment of this Court on the merits of his case—that portion of his answer wherein he claims the benefit of the occupying claimant's act of the State of Nebraska, was so to be claimed after the matter should be *finally* adjudicated, and it was in no sense a waiver of his right to argument and judgment in this Court.

Second. The question of the statute of limitations is distinctly raised in this suit, and the evidence shows that defence is well taken, and this question did not arise in the case of Van Wyck *vs.* Knevals, No. 1033.

Third. If this case is entirely similar plaintiff has the right to an argument in Court and not be summarily dismissed on motion where the merits cannot be discussed.

DELINZO A. WALDEN,
Plaintiff.

by C. H. VAN WYCK,
His Attorney.

114-373

Office Supreme Court U. S.
FILED.
APR 1 1885
JAMES H. McKENNEY.
CLERK.

IN THE SUPREME COURT

OF THE

UNITED STATES.

Appeal from the Circuit Court, for the District of Nebraska.

DELENZO A. WALDEN, *Appellant,*
VS
SHERMAN W. KNEVALS, *Appellee.*

BRIEF OF APPELLANT.

BEATRICE, NEBRASKA:
GAGE COUNTY DEMOCRAT BOOK AND JOB PRINT.
1885.

IN THE SUPREME COURT

OF THE

UNITED STATES.

Appeal from the Circuit Court, for the District of Nebraska.

DELENZO A. WALDEN, *Appellant.*
vs.
SHERMAN W. KNEVALS, *Appellee.*

BRIEF OF APPELLANT.

STATEMENT OF CASE.

This suit was brought in the circuit court by Sherman W. Knevals praying that the defendant, Delenzo A. Walden be declared to hold certain lands situated in Thayer county, Nebraska, in trust for him, and decreed to convey the same for the reason that said land

was within the grant to the St. Joseph and Denver City railroad company, under an act of Congress passed July 23, 1866, entitled "An act for a grant to the State of Kansas to aid in the construction of the Northern Kansas railroad and telegraph," said Knevals having acquired all the interest of the railroad company in that behalf.

The bill was filed January 13, 1880; subpœna in chancery issued but not served, and no service was had by publication or otherwise, and no appearance was entered till May 21, 1880. On January 3, 1881, the defendant answered the bill of complaint, and on November 22, 1881, an agreed statement of facts was filed and the suit submitted to the court thereon. On January 21, 1882, the court entered a decree as prayed by complainant, and the defendant brings the cause to this court upon appeal from the findings and decree of the circuit court.

POINTS OF ERROR.

It is submitted that the circuit court erred in its proceedings, and the following points of error are relied upon by counsel for appellant.

I.

Complainants suit was barred by the statute of limitations.

The defendant plead the statute of limitations in his answer, and the agreed statement of facts upon which the cause was tried admits that one Clarke Irvin entered the lands in controversy and purchased the same of the United States on the 8th day of April, 1870, and duly complied with the law in that behalf and obtained a patent therefor and thereafter duly sold and conveyed the same in good faith, without any notice of complainants equity, to the defendant, and "that the said defendant and his grantor have been in the peaceable occupation and possession of said lands under said entry and patent and deed ever since the said 8th day of April, 1870, and have paid all taxes and assessments against said lands and have made valuable and lasting improvements thereon in good faith, and upon the belief that the defendant and his grantor were the absolute owners thereof." (Printed record page 24.)

The bill of complaint was filed January 13, 1880, but no subpœna was ever served on defendant and he entered his appearance May 21, 1880, ten years, one month and thirteen days after the defendant and his grantors took possession and obtained the title and control of said lands. The suit was commenced as to the defendant at the time of the entry of his appearance, and not before, and more than ten years had elapsed since the complainant's cause of action accrued. The suit was clearly barred under the laws of Nebraska, which declare that "An action for the recovery of the title or posses-

sion of lands can only be brought within ten years after the cause of such action shall have accrued."

Com. Stat. of Neb., 531, Code, Sec. 6.

Section 19 of the code defines when the action shall be deemed commenced.

See also 2 McCreary 135.

The statute of limitations is a statute of repose and is to be strictly construed and the construction thereof by the state courts is binding on the United States courts in cases at law and equity

Angell on Limitations, secs. 23–29 and cases cited.

In the language of Justice Storry, in *Bell* v *Morrison*, 1 Peters, 360, "A statute of limitation instead of being viewed in an unfavorable light as an unjust and discreditable defense should have received such support from courts of justice as would have made it what it was intended emphatically to be, a *statute of repose*."

McClurg v *Sillyman*, 3 Peters 270.

The statute of limitations applies with full force to cases of resulting, implied, and constructive trusts.

Angell on Limitations, sec. 469.
Kane v *Bloodgood*, 7 Johns. Ch. 90

The following general doctrines upon the subject have been advanced by the supreme court of the United States, as being well established: "Though time does not bar a direct trust as between trustee and *cestui que trust* till it is disavowed, yet where a constructive trust is made out in equity, time protects the trustee, though his conduct was originally fraudulent, and his purchase would have been repudiated for fraud. So when a party takes possession in his own right, and was *prima facia* the owner, and is turned into a trustee by matter of evidence merely; and when one intending to purchase their entire interest in the land took a conveyance without limitation to heirs; passing only an estate for life, the lapse of fourteen years after expiration of life estate, was a protection to the heirs of the purchaser. What reasonable time is within which a constructive trust can be enforced, depends on the circumstances of the case. But there can be few cases where it can be done after twenty years peaceable possession by the person who claims as his own right but whose acts have made him trustee by implication. This possession entitles him at least to the same protection as that of a direct trustee, who to the plaintiff's knowledge, disavows the trust and holds adversely."

DeConche v *Savitier*, 3 Johns. Ch. 190.
Walker v *Walker*, 16 Sergt. & Rawl 170.
Higgenbottom v *Burnet*, 5 Johns. Ch. 184.

II.

The complainant is estopped from setting up his claim of title to the lands as against defendant.

The agreed statement of facts establishes the following facts:

1. That the patentee, Clarke Irvin, purchased and obtained the title to the said lands in good faith and without any knowledge or notice of complainant's claims or rights. (Printed record page 23.)

2. That defendant purchased and obtained the title to said lands of the patentee in good faith and for a valuable consideration fully paid, and without any notice that the complainant or his grantors "had or claimed any interest in, claim upon, or title to the said lands whatsoever." (Printed record page 24.)

3. That the mortgage, under which complainant obtained whatever title the railroad company had to the lands, was never filed or recorded in the county where said lands were situated, or in any other county in Nebraska. (Printed record page 23.)

4. That the complainant and his grantors knew that a patent to said lands had been issued to Clark Irwin and yet took no steps to obtain possession or title to the same or to give notice of any equity, and stood by and

saw defendant purchase the same without any remonstrance or setting up any claim of title or interest.

These facts are more than enough to constitute an estoppel *in pais* and bring this suit within the established principles of equitable estopple. The railroad company permitted the patent to the land to be issued to Clark Irwin and permitted him for years to not only hold the legal title, but to have the actual possession and control of the land and hold himself out to the world and to the defendant as the owner in law and equity, and to sell and transfer the legal title in good faith and without notice of any other claim or interest to the defendant, the title of defendant and his grantor being of record in the county where the lands were situated.

The doctrine is as expressed by Bigelow on Estopple 479, "it is now a well established principle that when the true owner of property holds out or allows another to appear as the owner of or having full power of disposition over the property, the same being in the latters actual possession, and innocent third parties are thus led into dealing with such apparent owner, they will be protected."

Howland v *Woodruff*, 60 N. Y. 73.
Anderson v *Armstead*, 69 Ills. 452.
Stewart v *Mumford*, 91 *ibid* 58.
Carter v *Faley*, 67 Ind. 427.
Babbitt v *Shryre*, 70 *ibid* 513.

Williams v *Niagara Ins. Co.*, 50 Iowa 561.
Morris v *Shannon*, 12 Bush. 89.
Montague v *Weil*, 30 La. An. 50 and 185.

And this principle is held to apply to a *cestui que trust* who allows and encourages the trustee to appear as the absolute owner of the trust property and thereby causes an innocent person to act upon that belief and purchase the same.

Regina v *Shropshire Union Co.*, L. R. 8,Q.B. 420.
Stephens v *Baird*, 9 Cowen 274.
Welland Canal Co. v *Hathaway*, 8 Wend. 480.
Bigelow on Estopple 481 and cases cited.

Not only is this the general doctrine of estoppel, but the registry laws of the State of Nebraska estop the complainant from asserting his claim, the facts in this case being agreed upon that defendant bought in good faith and without notice.

Chapter 73, entitled "Real Estate," of the Compiled Statutes of Nebraska requires all conveyances of real estate to be recorded, and section 16 of said chapter provides as follows:

"All deeds, mortgages and other instruments of writing which are required to be recorded, shall take effect and be in force from and after the time of delivering the same to the clerk for record, and not before, as to all

creditors and subsequent purchasers in good faith without notice; and all such deeds, mortgages and other instruments shall be adjudged void as to all such creditors and subsequent purchasers without notice, whose deeds, mortgages and other instruments shall be first recorded."

The judicial decisions of Nebraska and of all states having registry laws of such import, are uniform in their construction of the imperative requirements of a statute so plain and unequivocal.

III.

The grant of land is to the State of Kansas for the benefit of a corporation of that state, and was not intended to embrace lands outside of that state. The wording of the act which has been construed into transferring, *eo instanti*, the lands of Nebraska to the State of Kansas is:—

"That there is hereby granted to the State of Kansas "for the use and benefit of the St. Joseph & Denver "City Railroad Company, the same being a corporation "organized under the laws of the State of Kansas to "construct and operate a railroad from Elwood, in Kan- "sas, westwardly *via* Marysville, in the same state, so "as to effect a junction with the Union Pacific railroad "or any branch thereof, not further west than the one "hundredth meridian of west longitude, every alternate

"section of land, designated by odd numbers, for ten "sections in width on each side of said road to the point "of intersection."

One of the provisos annexed to the section making the grant is as follows:

"That the lands hereby granted for and on account "of said road shall be exclusively applied in the con- "struction of the same, and for no other purpose what- "ever."

Section 3 contains the following clause:

"When the governor of the State of Kansas shall cer- "tify that any section of ten consecutive miles of said "road is completed in good substantial and workman- "like manner as a first-class railroad, then the said Sec- "retary of the Interior shall issue to the said company "patents for so many sections of the land hereinbefore "granted, as lie opposite and coterminous with the said "completed sections. And when certificates of the "governor aforesaid shall be presented to said secretary "of the completion, as aforesaid, of each successive sec- "tion of ten consecutive miles of said road, the said sec- "retary shall in like manner issue to said company "patents for the said sections of land aforesaid for "each of said sections of road until said road shall be "completed."

We insist that this grant, being to the State of Kansas for the use and benefit of a corporation created by the laws of Kansas for the purpose of constructing a railroad, to be carried into effect by the governor of Kansas, must be confined within the limits of the State of Kansas.

A grant of land to one state will not be extended into another state without express words of enactment to that effect. The act making this grant contains no provisions, by virtue of which the State of Kansas is to hold public domain within the limits of the State or Territory of Nebraska. Hence we say the grant must be confined to the territorial limits of the State of Kansas. As an authority in point we quote from the opinion of Attorney-General Caleb Cushing in the case of "the Des Moines Improvement," where, in construing a grant made by Congress to the State of Iowa for the purpose of aiding in the improvement of the navigation of the river Des Moines, he says:

"Now, the language of the act is explicit granting to "Iowa the alternate sections in a strip five miles in "width *on each side of the said river* Des Moines, and "improvement is, in the equally explicit terms of the "act, from its mouth to the Raccoon Fork. But while "carrying the grant above the Raccoon Fork to the "source of the Des Moines, where the improvement "does not reach, he (Mr. Walker) lops it off below along

"the line of the improvement by excluding lands on the "river in the State of Missouri. The explanation of "which is that for the last twenty-five miles of its course "the river Des Moines is the dividing line between the "States of Missouri and Iowa. Missouri enjoys directly "all the benefits of the improvement of the navigation "of the river; but no land in Missouri is to be compre- "hended in the grant, notwithstanding its terms are of "lands *on each side* of the river; for the obvious and "sufficient reason that the act contains no provisions "authorizing, but on the contrary forbids Iowa to take "hold and manage lands in the State of Missouri. *

* * * * * * * *

"Mr. Walker did not say, and could not have said, that "the grant extends into Minnesota. If he had appre- "hended any such consequences of deciding that the "grant extends above the Raccoon Fork he could not "have made this decision, but must have referred the "state, as Mr. Ewing afterward did, to Congress. *That "is plainly to be inferred from the consideration that the "act of Congress cannot be executed if it be so construed as "to assume that the grant extends into Minnesota. It con- "tains no provisions, in virtue of which one state is to hold "public domain within the limits of another state or in- "choate state.* Impressed by the force of this considera- "tion, Mr. Walker excluded from the purview of the "grant the land on one side of the river for the length "of twenty-five miles, though plainly comprehended by "the *letter of the act*."

"Of course it avails nothing to say that when the "grant was made, the part of Minnesota affected was "included in the limits of the State of Iowa, and that "therefore the letter of the law extends the grant be- "yond the north line of the state. So also the letter of "the law comprehends lands in Missouri. But the let- "ter of the law in the former case, as well as in the latter "must yield to the legal objection *that without language "of enactment to that express effect it cannot be inferred "from other words of enactment that a grant of land to "one state extends into another state* (including in the "phrase inchoate states.")

Opinions of Attorney-Generals, 7th Vol., pp. 704–706.

This is a grant of land to the State of Kansas for the benefit of a corporation organized under the laws of Kansas to aid in the construction of a railroad. The location of the grant depended entirely upon the location of the road. It is ten miles in width on each side of said road. It will hardly be contended that Congress intended to extend this grant beyond the limits where the road could legitimately be built. This Kansas corporation could not lawfully extend its road into the State of Nebraska, certainly not without complying with the laws of the State of Nebraska on this subject, and even then it is a matter of some doubt whether it is the same as the Kansas corporation. If a Kansas corporation extends its road into the State of Nebraska it

must do so by virtue of the powers conferred upon it by the laws of Nebraska. The power conferred by the laws of Kansas ends with the limits of that state. In the case of *The Bank of Augusta* v *Earle*, 13 Pet., 512, the court says: "That the artificial person or legal entity, "known to the common law as a corporation, can have "no legal existence out of the bounds of the sovereignty "by which it is created; that it exists only in contem- "plation of law and by force of law; and when the law "ceases to operate the corporation can have no exist- "ence. It must dwell in the place of its creation."

And in the case of the *Ohio & Mississippi Railroad Company* v *Wheeler*, 1 Black., 297, the court says: "It is "true that a corporation by the name and style of the "plaintiffs appears to have been chartered by the states "of Indiana and Ohio, clothed with the same capacities "and powers and intended to accomplish the same ob- "jects, and it is spoken of in the laws of the states as "one corporate body, exercising the same powers and "fulfilling the same duties in both states. Yet it has "no legal existence in either state except by the law of "the state. And neither state could confer on it a cor- "porate existence in the other, or add to or diminish "the powers to be there exercised. It may indeed be "composed of and represent, under the corporate name, "the same natural persons, but the legal entity or per- "son, which exists by force of law, can have no exist- "ence beyond the limits of the state or sovereignty

"which brings it into life and endues it with its facul-
"ties and powers. The president and directors of the
"Ohio & Mississsippi Railroad Company is therefore a
"distinct and separate corporate body in Indiana from
"the corporate body of the same name in Ohio."

In the case of the *Lafayette Insurance Company* v *French et al.*, 18 How., 407, the court says: "A corpora-
"tion created by Indiana can transact business in Ohio
"only with the consent, express or implied, of the latter
"state. This consent may be accompanied by such con-
"ditions as Ohio may think fit to impose; and these
"conditions must be deemed valid and effectual by other
"states and by this court, provided they are not repug-
"nant to the constitution or laws of the United States,
"or inconsistent with those rules of public law which
"secure the jurisdiction and authority of each state
"from encroachment by all others, or that natural prin-
"ciple of natural justice which forbids condemnation
"without opportunity for defense."

Again, in the case of *Paul* v *Virginia*, 8 Wall., 181 the court says:

"Now a grant of corporate existence is a grant of
"special privileges to the corporators, enabling them to
"act for certain designated purposes as a single indi-
"vidual, and exempting them, unless otherwise speci-
"ally provided, from individual liability. The cor-
"poration being the mere creation of local laws can

"have no legal existence beyond the limits of the sov-
"ereignty where created. As said by this court in
"*Bank of Augusta* v *Earle*, it must dwell in the place of
"its creation and not migrate to another sovereignty.
"The recognition of its existence, even by other States,
"and the enforcement of its contracts made therein,
"depend purely upon the comity of those states—a
"comity which is never extended where the existence
"of the corporation or the exercise of its powers are
"prejudicial to their interests or repugnant to their
"policy. Having no absolute right of recognition in
"other states, but depending for such recognition and
"the enforcement of its contracts upon their assent, it
"follows as matter of course that such assent may be
"granted upon such terms and conditions as the state
"may think proper to impose."

By virtue of what authority does the Kansas corporation extend its road into the State of Nebraska. As we have seen, Kansas has no power to give it, and Nebraska alone can confer this right and give this Kansas corporation a legal *status* in this state. Has it done so, and had the corporation in question any legal *status* in this state at the time the lands in question were entered at the land office? If it had the complainant in his bill wholly fails to inform us how it obtained it. And for this reason, if no other, we think the bill subject to demurrer. The laws of Nebraska require a Kansas corporation which wishes to extend its road into this state to "first file a true copy of its articles of incorporation

with the secretary of this state, and shall comply with "the laws of Nebraska as to filing and recording articles "of incorporation, and in all things required by law re- "lating to railroads and otherwise in this state; and "such non-resident railroad company shall keep an office "in this state in some county in which its road is, or is "proposed to be, and shall be liable to civil process, to "be sued and to sue, as provided by law."

Genl. Stat. of Neb. 203—1.

The bill states that the company built its road through the counties of Thayer and Nuckolls, in the State of Nebraska, and that the land in question is in the State of Nebraska. But by virtue of what right the corporation entered its road in this state the bill fails to inform us. Now we insist that before this railroad company had any legal status in the State of Nebraska it must in all respects have complied with the laws of Nebraska conferring upon it the right to enter the state. And the acts which the company did in endeavoring to comply with these laws should be fully set out by the complainant in his bill, for two reasons: First, that the court may see if the laws have been complied with; and secondly, that the defendant may traverse them if he believes the facts alleged to be untrue.

Grants of this description are strictly construed against the grantee; nothing passes but what is conveyed by clear and explicit language; and as the rights

here claimed are derived entirely from the act of Congress, the donation stands on the same footing of a grant by the public to a private company, the terms of which must be plainly expressed in the statute, and if not thus expressed, can not be implied. What is not given expressly, or by necessary implication, is witheld. The interpretation of the grant should be reasonable, and such as will give effect to the intention of Congress; and this is to be ascertained from the terms employed, the situation of the parties at the time, and the nature of the grant.

Leavenworth &c. R. R. Co. v *U. S.*, 2 Otto, 733.
The Dubuque &c. R. R. Co. v *Litchfield*, 23 How., 60.

IV.

The St. Joseph & Denver City Railroad Company named in the grant had ceased to exist as a corporation and had no authority to construct a road or accept a grant of lands on the 23d of May, 1866, when the said act of congress was approved, and had violated every requirement of the charter which gave it existence long before the map or plat of the line of the road was filed in the office of the Secretary of the Interior on March 21, 1870. The act to incorporate the Marysville, Palmetto & Roseport Railroad Company (Exhibit "A"), provides:

"SEC. 13. Said company shall commence the construc-
"tion of said road within seven years, and shall com-
"plete the same in ten years thereafter."

The act of the State of Kansas of 1862 (Exhibit "B"), which gave the railroad company the right to change its name, etc., expressly provided in section 3 that "The "time given by law to such railroad company within "which to commence the construction of its road shall "not be hereby extended."

By the stipulated facts it appears that "Neither the "Marysville, Palmetto & Roseport Railroad Company "nor the St. Joseph & Denver City Railroad Company "commenced the construction of or constructed said "road or any part thereof from Marysville or Palmetto "City to Roseport, or from Marysville to Elwood or any "branch thereof, until the 15th of March, 1867." Thus the very lines that the charter said should be built, were not commenced till after the time limited for their completion had expired.

The grant of Congress does not pretend and can not be construed into creating a railroad corporation or giving powers to an institution that had even then become defunct by reason of non compliance with the law of its existence.

A corporation is only a creation of the statute. It has no powers except those conferred upon it by the sov-

ereignty which created it. It exists only by force of law, and when the legal requirements of its existence are not complied with its life stops, its powers fail.

Bank of Augusta v *Earl*, 15 Pet. 519.
Runyon v *Lessee of Carter*, 14 Pet. 122.
Redfield on Rys. 56.
O. & M. R. R. Co. v *Wheeler*, 1 Black. 286.

V.

The road and line of said road was not actually surveyed, located, and "definitely fixed" until November, 1870, long after Clark Irvin, defendant's grantor, had purchased the same of the United States, and hence the railroad was not entitled to this land under the terms of the grant.

The first section of the act of Congress, after explaining the grant of each alternate section, &c., declares: "*But in case it shall appear that the United States have,* "*when the line, or route, of said road is definitely fixed,* "*sold any section or any part thereof, granted as aforesaid* * * * * *then it shall be the duty of the Secre-* "*tary of the Interior to cause to be selected other lands in* "*lieu thereof* to be held by the State of Kansas for said "railroad company."

By the stipulation of facts "the road and lines of said "railroad as actually constructed by said railroad com-

"pany in Thayer county (where said land was located) "was not surveyed and staked on the ground until No- "vember, 1870." It also appears that the road built was not on the proposed line, and actually was from one to three miles from it all the way from Thayer county to Hastings. Thus we see that "when the line or route of "said road is definitely fixed" the United States had sold the land in controversy to defendant's grantor, and hence the same was exempted from the grant, and it became the duty of the Secretary of the Interior to select other lands in lieu thereof, for the railrad, and in the absence of proof to the contrary, the court will presume that this officer did his duty, and that the railroad company got its lands if it was entitled to them.

Lessieur v *Price*, 12 How. 74.
Mo. &c. R. R. Co. v *K. P. R. R. Co.*, 97 U. S. 498-9.

VI.

The road was never constructed "so as to effect a "junction with the Union Pacific railroad or any branch "thereof not further west than the one hundredth me- "ridian of west longitude" within ten years from the date of the company's acceptance of the grant, and hence under the terms of the grant the land in controversy remaining unpatented to the railroad reverted to the government.

If the United States at the time it sold and patented the land to defendant's grantor had no title by reason of the grant being *in presenti*, and yet afterwards by reason of the failure of the railroad to complete the road the title reverted to the United States, then under a well settled rule of law the title immediately inured to the benefit of the defendant's grantor and defendant. The United States can not be exempt from the established principles of the transfer of real estate by a person who attempts to convey a greater interest than he has and afterwards acquires such interest, simply because the railroad was encouraged by a congressional grant. There would appear to be no legal reason or equitable principle requiring a different rule or liability.

It is not pretended that the railroad complied with the terms of its grant in regard to the time of the construction of the road, or the forming of a junction with the Union Pacific railroad. A junction with the Burlington & Missouri River railroad is not such a compliance.

VII.

The equities are all in favor of defendant; every material allegation of the bill is denied, and must be proven. The stipulated facts do not entitle complainant to equitable relief. The good faith of defendant and his grantor is admitted. The agreed statement of facts (page 21 printed record) shows that the mortgage

under which complainant obtained title by foreclosure proceedings, did not describe land in controversy and was never filed or recorded; that defendant and his grantor was not a party to the foreclosure proceedings; that the road was never constructed so as to form a junction with the Union Pacific or any branch thereof; that the lands were not withdrawn from market by the local land officers nor ordered withdrawn by the Secretary of the Interior till long after the purchase by Clark Irvin. The good faith of the defendant and his grantor; the length of time of their undisputed possession as owners, and the payment of all taxes and the making of valuable and lasting improvements are in strong contrast to the failures, lasches and silence of the plaintiff for more than ten years, and appeal very strongly to the equity of the court.

~~L. W. COLBY,~~
~~Solicitor for Appellant.~~

D Lenzo H. Walden
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114-373

In the Supreme Court of the United States.

DELINZO A. WALDEN, APPELLANT,

vs.

SHERMAN W. KNEVALS.

MOTION TO DISMISS APPEAL AND AFFIRM DECREE, AND BRIEF FOR THE APPELLEE THEREON.

Now comes the appellee, Sherman W. Knevals, by J. M. Woolworth his solicitor, and now here moves the Court to dismiss the appeal herein, on the ground that the appellant having claimed the benefit of the occupying claimant law of the State of Nebraska, in his answer to the bill, has waived his right to have the decree against which this appeal is taken, reviewed by this court; and further moves the court to affirm the said decree, because it is manifest that the question on which the jurisdiction of this court depends is so frivolous as not to need further argument.

J. M. WOOLWORTH,

Solicitor, and of Counsel for Appellee.

BRIEF IN SUPPORT OF MOTION.

This was a bill in equity to recover the legal title to a tract of one hundred and sixty acres of land in the

State of Nebraska, and is in all its circumstances the same as that of *Van Wyck, Appellant, vs. Knevals*, No. 1033, determined at the present term of the court.

In his answer the appellant alleges:

"And the said defendant, for a further answer to the said complainant's said bill, saith that the said Clark Irwin, who entered and purchased said parcel of land from the United States, as hereinbefore set forth, went into the possession and occupation thereof, on or about the said 8th day of April, 1870, and that he with the subsequent grantees and grantors under him, with the said defendant, have ever since paid all the taxes and assessments against said land, and expended large sums of money in that behalf, and have made valuable and lasting improvements thereon, in good faith and upon the belief that they held the title thereto in fee, and have been in the continuous and sole occupation and possession of the said parcel of land." * * * "And the defendant further humbly prays that in the event this honorable court should grant the prayer of the said complainant in his said bill, and by a decree herein declare that the said patent was issued to and received by the said party hereinbefore referred to, and that he purchased and entered said parcel of land in trust for said company, and not otherwise, and that the title thereunder is now held by the defendant in trust for the said complainant, and should further decree that said defendant convey the said parcel of land to the said complainant, then that the defendant may demand and recover the value of all lasting and valuable improvements made on said parcel of land, and

of all taxes and assessments paid thereon, and that such proceedings may be had in the defendant's behalf as provided by the statutes of Nebraska and the laws in force for the relief of the defendant as an occupying claimant, and for such other and further relief as the defendant may be entitled to in equity."

The facts, so far as it is necessary to state them for the purpose of this motion, are as follows: on the 23rd of July, 1866, Congress passed an act, a copy of which is annexed to the bill, the first section of which grants to the State of Kansas for the use and benefit of the Saint Joseph and Denver City Railroad Company, every alternate section of land designated by odd numbers, for ten sections in width on each side of said road, to the point of intersection with the Union Pacific Railroad, or a branch thereof.

Then follow several provisos not material here to notice.

The 4th section provides:

"That as soon as the said Company shall file with the Secretary of the Interior maps of its lines, designating the route thereof, it shall be the duty of the said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

The Company duly accepted the act: and its engineers having made, and its directors having approved, a topographical map of the country through which it proposed to build its road, on the 25th of March, 1870, the said map, endorsed with certificates showing the action of the direc-

tors in that behalf, was filed with the Secretary of the Interior, who accepted it. On the 28th of the same month he transmitted it to the Commissioner of the General Land Office in a letter, in which, among other things, he directed that officer to "instruct the proper local officers to withhold from sale, or other disposal, the odd numbered sections within the limits of twenty miles on each side of the road."

On the 8th of April, 1870, the Commissioner forwarded a copy of the map to the Register and Receiver of the Land Office, at Beatrice. It was not received by those officers until April 15th. The company built and completed sections of the road from time to time, until July 15th, 1872, when it was completed to Hastings, where it made a junction with the Burlington & Missouri River Railroad in Nebraska; but the road has never been completed to any point on the Union Pacific, unless the said Burlington road is a branch thereof. The road so built was substantially on the line delineated on the map, and ran through Thayer and Nuckolls counties, which are within the district of lands subject to sale at Beatrice. But, at a point about one mile east of the lands in question in this suit, and about seventy-five miles east of Hastings, the road as constructed, departed from the proposed line as shown on the map: at a point opposite the lands here in controversy the road as built was from forty to sixty rods from the line marked on the map: and from that point to Hastings it deflected from the line marked on the map from one to three miles. The lands in dispute are within ten miles of the road as built and of the line deline-

ated on the map. Section 3 of the act making the grant, among other things, provides that,

"The lands hereby granted, held, and reserved as aforesaid, shall inure to the benefit of said Company as follows: When the Governor of the State of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial, and workmanlike manner, as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land hereinbefore granted as lie opposite to and coterminus with the said completed sections. And when certificates of the Governor, aforesaid, shall be presented to said Secretary, of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the said sections of said land, as aforesaid, for each of said sections of road until said road shall be completed."

As each section of the road was built, the Governor of Kansas made the required certificates and filed them with the Secretary of the Interior. Patents for most of the lands claimed to have been granted by the act have been issued to the Railroad Company.

On the 13th of April, 1870, that is to say, eighteen days after the map was filed with the Secretary, and two days before it reached the local office, the appellant entered the lands here in question at private entry at the office at Beatrice, and paid therefor one dollar and twenty-five cents per acre: and on the 15th of November, 1871, a patent was issued to him therefor. On the 15th of April, 1873, and not before, the Railroad Company filed its articles and other evidences of incorporation with the

Secretary of State of Nebraska, but did not otherwise attempt to comply with the laws of that State in respect of foreign corporations extending their road into that State.

The original plaintiff and appellee here claims under the railroad company.

The statute, the benefit of which plaintiff prays in his answer, is as follows:

CHAPTER 63.—OCCUPYING CLAIMANTS.

SECTION 1. [*Improvements paid for before eviction.*] —That in all cases where any occupying claimant, being in quiet possession of any lands or tenements, for which such person can show a plain and connected title, in law or equity, derived from the records of some public office; or being in quiet possession of, and holding the same by deed, devise, descent, contract, bond or agreement, from and under any person claiming title as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded: or by being in quiet possession of, and holding the same under sale on execution against any person claiming title as aforesaid, derived from the records of some public office, or by deed duly authenticated and recorded, or being in possession of and holding any land under any sale for taxes, authorized by the laws of this state, or the laws of the territory of Nebraska, or any person in quiet possession of any land, claiming title thereto, and holding the same in good faith under a deed or sale made by executors, administrators, or guardians, or by any other person or persons in pursuance of any order of court, or decree in chancery where lands are or have been directed to be sold, and the purchaser or purchasers thereof have obtained title thereto and possession of the same without any fraud or collusion on his, her,

or their part, shall not be evicted or turned out of possession by any person or persons, who shall set up and prove an adverse and better title to said lands, until said occupying claimant, his, her, or their heirs, shall be fully paid the value of all lasting and valuable improvements made on said land by such occupying claimant, or by the person or persons under whom he, she, or they may hold the same previous to receiving actual notice, by the commencement of suit on such adverse claim, by which such eviction may be effected, unless such occupying claimant shall refuse to pay the person so getting up and proving an adverse and better title, the value of the land without the improvements made thereon as aforesaid, upon the demand of the successful claimant or his heirs hereinafter provided. [G. S. § 1, 500.]

SEC. 2. [*Occupants under tax title.*]—That the title by which the successful claimant succeeds against the occupying claimant, in all cases of lands sold for taxes, by virtue of any of the laws of this state or the laws of the territory of Nebraska, shall be considered an adverse and better title under the provisions of the first section, whether it be the title under which the taxes were due, and for which said land was sold, or any other claim or title whatever; and the occupying claimant holding possession of lands sold for taxes as aforesaid, having the deed of a county treasurer for such sale for taxes, or a certificate of sale of said land from a collector of taxes or county treasurer, or shall claim under the person or persons who hold such deed or certificate, shall be considered as having sufficient title to said land to demand the value of improvements under the provisions of the first section of this act.

SEC. 3. [*Entry of claim—Jury.*]—That the court rendering judgment in any case provided for by this act, against the occupying claimant, shall at the request of either party cause a journal entry thereof to be made and

thereupon a jury shall be impaneled by the court in the usual manner provided by law in civil causes.

SEC. 4. [*Duty of jury.*]—That the jury impaneled as above shall immediately proceed to view the premises in question, and then and there on oath or affirmation assess the value of all lasting and valuable improvements made as aforesaid on the lands in question, previous to the party receiving actual notice as aforesaid of such adverse claim, and shall also assess the damages, if any, which the said land may have sustained by waste, together with the net annual value of the rents and profits which the occupying claimant may have received from the same, after having received notice of the plaintiff's title by the service of process, and deduct the amount theron from the estimated value of such lasting and valuable improvements, and said jury shall also assess the value of the land in question at the time of rendering judgment as aforesaid, without the improvements made thereon, or damages sustained by waste as aforesaid.

SEC. 5. [*Return of jury—New valuation.*]—That the jury shall sign and seal their respective assessments and valuation aforesaid, and deposit the same with the clerk of the court, at such time as the court may direct; any if any person shall think himself or herself aggrieved by any such assessment or valuation aforesaid, he or she may apply to the court at the term to which the proceedings are returned; and said court may upon good cause shown, set aside such assessment or valuation, and order a new valuation and impanel a new jury as hereinbefore provided, [and] shall proceed in the same manner hereinbefore directed.

SEC. 6. [*Judgment for plaintiff—Mense profits barred.*]—That if the jury shall report a sum in favor of the plaintiff or plaintiffs in ejectment on the assessment

and valuation of the valuation and lasting improvements, and the assessment of damages for waste, and the net annual value of the rents and profits, the court shall render a judgment therefor without pleadings and issue execution thereon as in other cases; or if no excess be reported in favor of the plaintiff or plaintiffs, then in either case the plaintiff or plaintiffs in ejectment shall be thereby barred from having or maintaining any action for *mense* profits.

SEC. 7. [*Rights of successful claimant.*]—That if the jurors shall report a sum in favor of the occupying claimant or claimants on the assessment and valuation of the valuable and lasting improvements, deducting therefrom the damages, if any, sustained by waste, together with the net annual value of the rents and profits which the defendant or defendants may have received, after the commencement of the action of ejectment as aforesaid, the successful claimant or his heirs or the guardian of such heirs, they being minors, may at his, her, or their election, either demand of the occupying claimant the value of the land without improvements, so as aforesaid assessed, and tender a deed of the land in question to the occupying claimant; or he, she, or they, may pay the occupying claimant the sum allowed by the jury in his favor within a reasonable time, as the court shall allow.

SEC. 8. [*Same—Writ of possession.*]—That if the successful claimant or his heirs, or the guardians of such heirs, they being minors, shall elect to pay and do pay to the occupying claimant the sum so reported in his favor by the jury, within such reasonable time as the court have allowed for the payment, then a writ of possession shall issue in favor of said successful claimant, his heirs or the guardians of such heirs.

SEC. 9. [*Same.*]—That if the successful claimant, his heirs, or the guardians of such heirs, they being minors,

shall elect to receive the value of the lands, without improvements so as aforesaid assessed to be paid by the occupying claimant within such reasonable time as the court may allow, and shall tender a general warranty deed of the land in question conveying such adverse and better title, within the said time allowed by the court for the payment of the money in this section mentioned, and the occupying claimant shall refuse or neglect to pay said money (the value of the land without improvements) to the successful claimant, his heirs or their guardians, within the time limited as aforesaid, then a writ of possession shall be issued in favor of said successful claimant, his heirs or their guardians.

SEC. 10. [*Rights of occupying claimant.*]—That the occupying claimant, or his heirs, shall in no case be evicted from the possession of such land unless, as is provided in the two preceding sections, where an application is made for the value of improvements under this law; and in all cases where the occupying claimant or claimants, or his or their heirs, shall have paid into court the value of the lands in question, without improvements, within the time allowed by the court (where an election has been made by the successful claimant or claimants, his or her heirs, or guardians as aforesaid to surrender any tract of land under the provisions of this act,) such occupant or his heirs may at any time after such payment shall have been made, file his, her, or their petition in the court where such judgment of eviction was obtained, and obtain a decree for the title of such land, if the same had not been previously conveyed to such occupant as aforesaid.

The very stringent provisions of this statute contemplate a proceeding by the occupant whose title is decided against, to be had at once in the court of original jurisdiction, upon the rendition of judgment against him.

Section 3 provides that, the court rendering judgment, that is to say, the court in which the trial is had, shall enter the request of either party, for the purpose of ascertaining the facts upon which the right given in the act may be secured.

All of the subsequent sections contemplate proceedings in the court of original jurisdiction, immediately upon the rendition of the judgment.

In *Buchanan vs. Dorsey*, 11 Neb. 373, the supreme court said upon this subject: "After asking and receiving all this at the hands of the court, on the strength of the result of the former action, should he be permitted to question its correctness? As we think, very clearly not. If he believed that the result was unjust and erroneous, and desired a review of the proceedings by which it was brought about, he should have taken no step showing a voluntary acquiescence therein, but at once pursued the course open to him by petition in error. This, however, he did not do, but elected to recognize its binding force by seeking and obtaining relief under it. Having done this, he is now estopped from seeking relief by proceedings in error."

The principle of *Combe vs. Naira*, 2 Cr. C. C. 676, is the same.

If it be said that the jurisdiction of this court cannot be curtailed by the laws of the state, we answer that, the estoppel against the appellant operates by virtue of general principles of law, and not of the provisions of the statute.

It is manifest that a party to a decree may by his acts be estopped to complain of it. Thus, if he act upon it and

take its benefits, he cannot appeal. In *Crawshay vs. Soutter*, 6 Wall. 739, Mr. Justice Davis, speaking for the whole court, says:

"After a protracted litigation, the circuit court for the district of Wisconsin, at its last September term, confirmed the sale made by the Marshal in what is known as the land grant foreclosure suit, brought by Soutter and Knapp, surviving trustees, against the LaCross and Milwaukee Railroad Company. These appeals are brought here to review that order of confirmation, and will be considered together. Various exceptions were taken in the court below, and are renewed here, to the report of the Marshal of the sale of the mortgaged premises, but it is unnecessary to notice them, as Crawshay and Oddie are not in condition to avail themselves of them; and the rights of Vose, as owner of bonds or certificates, are protected by the order of confirmation. Crawshay and Oddie were original bondholders under the land grant mortgage, but before filing their exceptions to the report of sale, they had surrendered their bonds to the trustees, appointed under the scheme for the adjustment of the affairs of the LaCrosse Company; took certificates of stock, and subsequently the bonds and stock of the St. Paul Company, as provided in the agreement for organizing it. By doing this, they elected to abide by the action of the trustees, and cannot now be heard to interpose any objection to the confirmation of the sale."

Terry vs. Ackermann, 93 U. S. 38, is to the same effect.

The theory of the statute, the benefit of which the appellant claimed in the court below is that, a valid judgment has been rightly rendered, and upon the judgment the right secured by the act has accrued. Without the

judgment, there could be no right; because of the judgment he may have the right. When, then, he claims a benefit derived to him from the judgment, he accepts the judgment, and cannot afterwards question its correctness.

Should the court be of opinion that the appellant has done nothing which stands in his way to have the decree reviewed here, yet it is clear that the appeal cannot be sustained.

In the case of *Van Wyck vs. Knevals*, every question which can be made on this appeal has been very carefully considered by this court, and determined against the appellant here. The bills, the answers, and the agreed statement of facts, were the same. The appeal is frivolous, and will not bear further argument here. The decree, therefore, should be affirmed.

J. M. WOOLWORTH,
Solicitor for Appellee and of Counsel.

114-373

Office Supreme Court U. S.
FILED.
JAN 28 1885
JAMES H. McKENNEY,
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1884.

No. 220.

DELINZO A. WALDEN, Appellant,

vs.

SHERMAN W. KNEVALS.

BRIEF FOR THE APPELLEE.

STATEMENT.

This is an appeal against a decree of the United States Circuit Court for the District of Nebraska, rendered on the 21st day of January, 1882, by the Hon. George W. McCrary, Circuit Judge.

On the 23rd day of July, 1866, Congress passed an Act, a copy of which is set forth at length in the record, at pages six, seven and eight. By this Act a grant was made to the State of Kansas, for the use and benefit of the Saint Joseph and Denver City Railroad Company, of every alternate section of land, designated by odd numbers, for ten sections in width on each side of a railroad to be built by said Company from Elwood, in Kansas, via Marysville in the same State, to a junction with the Union Pacific Railroad, or any branch

thereof, not further west than the one hundredth meridian of west longitude; such sections or parts thereof being excepted as had been already granted to other parties by the United States, or to which the right of pre-emption or homestead settlement had attached, or which had been reserved for any purpose. As sections of ten consecutive miles of road were constructed the Governor of Kansas was to certify the fact to the Secretary of the Interior, whereupon patents were to be issued to the Company.

It was further provided in the fourth section, that as soon as the Company should file with the Secretary of the Interior, a map of its line, designating the route thereof, the Secretary should withdraw from market the lands granted in "such manner as may be best calculated to effect the purposes of the Act and subserve the public interest."

It was alleged in the bill, and agreed in a stipulation of the facts made between the parties, which will be found on page 21, *et seq.* of the printed record, that the Company's engineers, having surveyed and staked out upon the ground the proposed line of said railroad, made a topographical map of the country through which said line ran, showing the government surveys, and the proposed route with reference to the section lines, and the towns, counties and rivers: which map was on the 21st of March, 1870, approved by the Board of Directors, and on the 25th of the same month, together with certificates endorsed thereon showing the aforesaid action, filed with the Secretary of the Interior, who on the 28th of the same month transmitted the same to the Commissioner of the General Land Office under cover of a letter, which is set forth on pages 39 and 40 of the record.

On the 8th of April following, the Commissioner transmitted by mail a copy of the map, to the Register and Receiver of the land office at Beatrice, under cover of a letter, which will be found on page 40 of the record. The copy of the map and the letter reached the local land office on the 15th of April following.

The Company completed sections of its road from time to time, until the 15th of July, 1872, on which day a junction was made by it with the Burlington and Missouri River Railroad in Nebraska,—the plaintiff claiming that that railroad was a branch of the Union Pacific Railroad,—so that the whole line was completed within six years from the passage of the Act making the grant: while the Act allowed ten years for that purpose. With the exception of the first sixty miles from Elwood, each section of ten miles was built and completed within the time limited by that Act. Thayer and Nuckolls Counties are more than one hundred miles west of Elwood.

The road and line as actually constructed in Thayer County was not surveyed or staked on the ground until November 1870, and was actually built upon a line which departed from that marked on the map from one to three miles, and at the point opposite the lands in controversy the line as constructed was distant from the proposed line from two to three miles. But the lands in controversy were within ten miles of the proposed line, and of the road as constructed.

On the 8th of April, 1870, one Clark Irvin entered the lands in question at the Land Office in Beatrice, and on the 1st of November, 1871, a patent therefor was issued to him.

His purchase was made before any instructions from the Land Department of the government had been received at the local land office to withdraw the lands from market and without actual personal knowledge or notice of the filing of the map with the Secretary, or of the Secretary's order to withdraw the lands from market. The patent was issued to him without protest, objection or claim on behalf of the Company, but afterwards the Company applied to the Land Department for a patent and tendered the necessary fees and charges. Its application was refused, because Irvin's right of entry and patent had attached to the lands.

The plaintiff showed title from the railroad company, and the defendant showed title from Irvin by warranty deed, for which he paid a valuable consideration, without notice of the claims of the plaintiff or his grantors. And the defendant and his grantor has been in possession since April 8th, 1870.

From this statement, and the record, it appears that the map was filed with the Secretary on the 25th of March, 1870, and Irvin's entry was made on the 8th of April of the same year, that is to say, fourteen days after the map was filed.

It is believed that these are the essential facts upon which the case must be determined.

POINTS.

All of the facts and circumstances of this case are precisely the same as those in the case of *Van Wyck vs. Knevals*, 106 U. S. 360, except that Van Wyck's entry was made on the 13th of April 1870,—only two days before the letter of the commissioner reached the local land office. Whereas, in this

case, Irvin's entry was made six days before that letter was received at the local office. But, inasmuch as both entries were made after the map was filed with the Secretary of the Interior, the difference is immaterial.

The principle of law upon which the determination must be had is the same in both cases: namely, the grant was *in presenti*, and attached to the section here in question as soon as the map was filed; and no valid adverse right or title to the same could be acquired by a subsequent entry or purchase.

Considering the case cited as decisive of all the questions which can be properly raised upon this record, it is not deemed worth while to trouble the Court with any farther discussion. *Van Wyck vs. Knevals*, was not only carefully considered by this Court, as appears from the elaborate opinion of Mr. Justice Field, who spoke for the whole Court, but was determined by an application to the facts in that case of principles ruled by this Court in a long series of its judgments.

J. M. WOOLWORTH,
Of Counsel for Appellee.

114-376

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 221.

THE PENN NATIONAL BANK, APPELLANT,

vs.

JAMES T. FURNESS, FRANCIS BRINLEY, ADMINISTRATOR OF EDWARD L. BRINLEY, DECEASED, JOSHUA P. ASH, WILLIAM H. ASH, DAWES E. FURNESS, AND GEORGE E. KRUMBHAAR, WHO WERE SUED WITH HENRY DAY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

FILED JUNE 7, 1882.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. 221.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

INDEX.

	Original.	Print.
Caption	1	1
Bill of complaint	2	1
Answer of Furness *et al.*	14	8
Exhibit A—Agreement of Furness, Brinley, Ash and Day, July 1, 1851	24	14
B—Agreement of Furness, Brinley & Co., and W. H. Ash and D. E. Furness	26	15
C—List of liabilities of Furness, Brinley & Co., July 12, 1877	27	15
D—List of liabilities of Furness, Brinley & Co., Jan. 1, 1878	28	16
E—Items of assigned estate	29	16
Answer of Brinley	31	17
Replication	39	21
Order for entry of decree *pro confesso* as to Krumbhaar	41	21
Order appointing examiner	42	22
Examiner's report	43	23
Testimony of Joshua P. Ash	44	23
William H. Ash	58	31
James T. Furness	62	34

JUDD & DETWEILER, PRINTERS, WASHINGTON.

	Original.	Print.
Testimony of Dawes E. Furness	76	43
William Gummere	78	44
Gillies Dallett	80	45
Edwin P. Graham	81	46
William Eckstein	83	47
George D. Krumbhaar	84	48
Lemuel C. Simon	87	49
Exhibit No. 1—Statement of note account	97	56
A—Certified copy of order appointing examiner	98	56
Suggestion of death of E. L. Brinley and substitution	100	57
Order referring cause to master	101	57
Report of master	102	57
Exhibit A—Exceptions to master's report	127	73
Cause taken under advisement	132	74
Decree	132	75
Order allowing appeal	134	75
Bond	136	76
Citation	138	77
Clerk's certificate	139	77
Assignment of errors	140	78

1 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit.

THE PENN NATIONAL BANK
vs.
JAMES T. FURNESS, FRANCIS BRINLEY, Administrator *cum testamento annexo* of the Estate of Edward L. Brinley, dec'd; JOSHUA P. ASH, WILLIAM H. ASH, DAWES E. FURNESS, and GEORGE D. KRUMBHAAR, who were sued with HENRY DAY. } In Equity.

Pleas and proceedings before the honorable the judges of the circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, of April session 1878, No. 86.

It is thus contained:

Be it remembered that on the 13th day of July, A. D. 1878, The Penn National Bank, by their solicitor, Nathan H. Sharpless, Esq., come into our said court here and file their bill of complaint against James T. Furness, Edward L. Brinley, Joshua P. Ash, Henry Day, William H. Ash, Dawes E. Furness, and George D. Krumbhaar, which said bill, being read, is in the words following, to wit:

2 In the Circuit Court of the United States for the Eastern District of Pennsylvania, in the Third Circuit.

To the honorable the judges of the court aforesaid sitting in equity:

The Penn National Bank, a banking association, established in the eastern district of Pennsylvania, in this circuit, under an act of the Congress of the United States, providing for national banking associations, entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved on the third day of June, A. D. eighteen hundred and sixty-four (1864), bring this their bill, as well on their own behalf as on that of such other creditors of a certain firm or copartnership hereinafter mentioned, doing business under the name, style, and title of Furness, Ash & Co., as having like interests with your orators and agreeing to contribute to the expenses of this suit, may become parties thereto against James T. Furness, Edward L. Brinley, Joshua P. Ash, Henry Day, William H. Ash, Dawes E. Furness, and George D. Krumbhaar.

And thereupon, humbly complaining, your orators show unto your honors:

1. That for a long time prior to the first day of January last (1878), the defendants, James T. Furness, Edward L. Brinley, Joshua P. Ash, Henry Day, William H. Ash, and Dawes E. Furness, as
3 copartners trading under the name and style of Furness, Brinley & Co., carried on the business of auctioneers, selling goods on commission, and making advances on consignments, in the city of Philadelphia, and the said firm became largely insolvent in said business, prior to the first day of July, A. D. eighteen hundred and seventy-seven, and have so continued thence hitherto. The said

insolvency thereof manifestly appeared upon the books of account of the said firm, although an attempt was made measurably to conceal it there, by carrying as cash on hand, by memorandums in the cash drawer, large sums of money which had previously been drawn out and expended for their individual purposes by the several members of said firm. On the first day of July aforesaid (1877), the defendants, James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness, were and thence hitherto have been insolvent, both as regards their copartnership and individual estates. The defendant, Edward L. Brinley, then was and is a gentleman of fortune with a private estate, amply sufficient, after all reprizes, to make payment in full of the indebtness of the said copartnership of Furness, Brinley & Co. The defendant, Henry Day, who resides in New Jersey, is also believed to be solvent.

2. In this condition of affairs the defendants, Edward L. Brinley, James T. Furness, and Joshua P. Ash, on the twenty-second day of October last (1877), made the following agreement in writing, touching their respective interests in the said copartnership of Furness, Brinley & Co., to wit:

"It is agreed that E. L. Brinley is to be treated as having retired from the firm of Furness, Brinley & Co., on July 1, 1877, and that he is not to be responsible for the expenses of the firm from that date. Mr. J. T. Furness and Mr. J. P. Ash guarantee Mr. Brinley against liability from any debts incurred, or losses made, since the same date.

4 "Mr. Brinley's capital in the firm is the sum of $25,000, on which interest is chargeable at six per cent. per annum, from July 1, 1877.

"Mr. Brinley has the right to withdraw his capital as follows:

"$5,000, December 1, 1877, with interest.
"$5,000, January 1, 1878, "
"$5,000, February 1, " "
"$5,000, March 1, " "
"$5,000, April 1, " "

"Whatever sum Mr. Brinley may have in the firm in excess of his $25,000 may be drawn as suits his convenience; should any of the above installments remain unpaid for ten days after it falls due, then the whole of the $25,000, or the unpaid balance, shall become due and payable.

"For these sums Mr. J. T. Furness and Mr. J. P. Ash are to be individually liable to Mr. Brinley.

"The withdrawal of Mr. Brinley from the firm of Furness, Brinley & Co. is to be announced on January 1, 1878.

"(Signed) JAMES T. FURNESS,
" " JOSHUA P. ASH.

"Philadelphia, October 22, 1877."

In accordance with the terms of the foregoing agreement, the business of said copartnership of Furness, Brinley & Co. continued, apparently as heretofore, until the first day of January last (1878),

on which date the dissolution thereof was publicly announced, as also the formation of the copartnership of Furness, Ash & Co., composed of the defendants, James T. Furness, Joshua P. Ash, and William H. Ash, to continue in the same business at the old stand, as the successors of Furness, Brinley & Co., and the said copartnership of Furness, Ash & Co. so continued in said business until
5 about the fifteenth day of March last (1878), when they failed therein, also largely insolvent, and on the eighteenth day of April then next (1878) made a voluntary assignment of their remaining assets, copartnership and individual, to the defendant, George D. Krumbhaar, in trust for their creditors, which said trust has been accepted by the said last-named defendant, and he has taken upon himself the burthen of the execution thereof.

3. At the time of their failure as aforesaid the said copartnership of Furness, Ash & Co. were, and still are, indebted to your orators in the sum of twelve thousand seven hundred and sixty-one dollars and eighty cents ($12,761.80), upon their commercial paper to that amount discounted for them and held by your orators; the whole indebtedness of said last-mentioned firm at the time of their said failure and now, your orators aver and charge, amounts to the sum of seventy-four thousand four hundred and fifty-five dollars and forty-three cents ($74,455.43), and that the same is truly set forth in the following statement thereof in writing furnished by them to your orators since their said failure, to wit:

FURNESS, ASH & CO.

Liabilities.

Weiner, S. & Co	$208 89
R. Rogers	600 00
J. W. Haven	552 00
W. Eckstein	1,800 00
Commercial Bank	16,000 00
Newbold Sons & Co.	18,000 00
Bank of North America	16,921 85
Penn National	12,761 80
National Bank of Northern Liberties	5,338 90
N. Weyl & Co.	91 70
E. L. Brinley	2,180 23
	$74,455 43

6 The great bulk, indeed, almost the whole amount, of the said indebtedness was created in the discount by the creditors named of the commercial paper of the said Furness, Ash & Co. for them, during the very short period (about two and one-half months) of the existence of that firm; the copartnership assets thereof, assigned as aforesaid to the defendant Krumbhaar, are of very little value, probably insufficient to pay a dividend of five per cent. upon said claims.

4. And your orators further show unto your honers that the

insolvency thereof manifestly appeared upon the books of account of the said firm, although an attempt was made measurably to conceal it there, by carrying as cash on hand, by memorandums in the cash drawer, large sums of money which had previously been drawn out and expended for their individual purposes by the several members of said firm. On the first day of July aforesaid (1877), the defendants, James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness, were and thence hitherto have been insolvent, both as regards their copartnership and individual estates. The defendant, Edward L. Brinley, then was and is a gentleman of fortune with a private estate, amply sufficient, after all reprizes, to make payment in full of the indebtness of the said copartnership of Furness, Brinley & Co. The defendant, Henry Day, who resides in New Jersey, is also believed to be solvent.

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3. At the time of their failure as aforesaid the said copartnership of Furness, Ash & Co. were, and still are, indebted to your orators in the sum of twelve thousand seven hundred and sixty-one dollars and eighty cents ($12,761.80), upon their commercial paper to that amount discounted for them and held by your orators; the whole indebtedness of said last-mentioned firm at the time of their said failure and now, your orators aver and charge, amounts to the sum of seventy-four thousand four hundred and fifty-five dollars and forty-three cents ($74,455.43), and that the same is truly set forth in the following statement thereof in writing furnished by them to your orators since their said failure, to wit:

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N. Weyl & Co.	91 70
E. L. Brinley	2,180 23
	$74,455 43

6 The great bulk, indeed, almost the whole amount, of the said indebtedness was created in the discount by the creditors named of the commercial paper of the said Furness, Ash & Co. for them, during the very short period (about two and one-half months) of the existence of that firm; the copartnership assets thereof, assigned as aforesaid to the defendant Krumbhaar, are of very little value, probably insufficient to pay a dividend of five per cent. upon said claims.

4. And your orators further show unto your honors that the

large sums aforesaid, so as aforesaid raised by the said Furness, Ash & Co., by the discount of their commercial paper, which were very much larger than the said firm of Furness, Brinley & Co. had been in the habit of raising during corresponding periods in late years, were not needed by them for the prosecution of the business of Furness, Ash & Co., nor were they in point of fact used therein; the said last-mentioned firm, during the time of its existence, really did very little business, but the sums so raised as aforesaid were procured for and used by them to a large amount in the payment of the debts of the said late firm of Furness, Brinley & Co., and in the payment to the said Edward L. Brinley of the sum of twenty thousand (20,000) dollars on account of the sum of twenty-five thousand dollars agreed to be paid him by the defendants, James T. Furness and Joshua P. Ash, in the writing aforesaid of October twenty-second last (1877), the instalments of five thousand dollars each mentioned therein being actually paid him, in some instances, before they became due under the terms thereof. The said firm of Furness, Ash & Co. had at the commencement thereof, or any time, no other capital than such interest in the debris of the assets of the insolvent firm of Furness, Brinley & Co., as the members of the new firm were severally entitled to therein; yet the said defendant, Edward L. Brinley, with full knowledge of this fact,

7 actively promoted the negotiation and discount of the commercial paper aforesaid of Furness, Ash & Co. as aforesaid, by statements made by him in the money market of the city of Philadelphia aforesaid, before the negotiation and discount of said commercial paper, that he "had drawn his capital out of the firm of Furness, Brinley & Co., as they did not need it;" that "the said firm of Furness, Ash & Co. were good," and the like, which your orators aver and charge were intended by him to come, and which, in fact, did come, to the ears of your orators and others, to whom said paper of Furness, Ash & Co. was offered for discount, and, upon the faith of which statements of the said Edward L. Brinley, your orators and others as aforesaid, to whom said paper was offered, discounted the same.

5. Wherefore your orators aver and charge that in the month of October last (1877) the said firm of Furness, Brinley & Co., and the individual members thereof aforesaid, other than the said Edward L. Brinley and Henry Day, being insolvent, the defendants, James T. Furness, Edward L. Brinley, and Joshua P. Ash, fraudulently combined and contrived to dissolve the aforesaid copartnership of Furness, Brinley & Co., and to pay to the said Edward L. Brinley the sum of twenty-five thousand dollars as the pretended amount of his capital therein, and to further these measures by creating a new firm of Furness, Ash & Co., upon whom the indebtedness of Furness, Brinley & Co. should be carried over by renewals of old and discounts of new commercial paper, and upon whose credit the amount of twenty-five thousand dollars should be borrowed to pay the said Edward L. Brinley, as provided in the agreement of October twenty-second last (1877), aforesaid, the end and scope of the scheme being to allow the responsible partner in said firm of Fur-

ness, Brinley & Co., to wit, the said Edward L. Brinley, not only to escape liability upon his individual estate for the debts
8 thereof, and to withdraw the sum of twenty-five thousand dollars from a source whence he was entitled to nothing, but to throw the indebtedness of Furness, Brinley & Co. upon, and to obtain the means for making this unjust payment by the discount of the paper of a firm without capital, to be composed of the insolvent members of the copartnership of Furness, Brinley & Co., and which it was anticipated, and in the nature of things it could only have been expected, would stand upon its legs barely long enough to accomplish the fraudulent scheme aforesaid, which was thereupon carried out by the defendants in this paragraph named (other than the said Henry Day), as hereinbefore set forth.

All which acts and doings are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orators in the premises. In consideration whereof, and forasmuch as your orators are wholly remediless in the premises, according to the strict rules of the common law, and can only have relief in a court of equity where matters of this nature are properly cognizable and relievable—

To the end, therefore, that the said defendants may, if they can, show why your orators should not have the relief hereby prayed, and may, upon their several and respective corporal oaths, and according to the best and utmost of their several and respective knowledge, remembrance, information and belief, full, true, direct, and perfect answer make to such of the several interrogatories hereinafter numbered and set forth, as by the note hereunder written, they are respectively required to answer, that is to say:

1. Whether or not the firm or copartnership of Furness, Brinley & Co., on the first day of July, eighteen hundred and seventy-seven, was composed as set forth in the stating part of this bill? If not, who, upon that date, did constitute said firm, and what were
9 the respective interests of the partners therein? Was there any written agreement existing on the date last aforesaid between the parties hereinbefore alleged as on that day constituting said firm relating to the business or profits of the said firm of Furness, Brinley & Co.? If yea, annex a copy thereof to your answer.

2. On the date last aforesaid was the said copartnership of Furness, Brinley & Co., and the individual copartners therein, solvent or insolvent? What was the amount of the debts due from the said copartnership of Furness, Brinley & Co. and the individual members thereof, on the date last aforesaid, or at any time thereafter during the existence thereof, that is to say, up to January first, eighteen hundred and seventy-eight, and to whom particularly were said debts due respectively? When, how, and by whom have such debts that have since been paid, settled, or arranged, been so paid, settled, or arranged? From what source or sources particularly were the means derived for that purpose? What were the assets of the said copartnership of Furness, Brinley & Co., and the individual partners therein, on the said first day of July, 1877, and what has become of them? How much has been realized from them, and what is the

value of the remainder? Have they been appraised (*i. e.*, the remaining ones); if yea, for how much?

3. Was not the writing dated October 22, 1877, made and executed as set forth in the stating part of this bill? Upon full settlement of all accounts, what was the actual balance due Edward L. Brinley upon the books of the firm of Furness, Brinley & Co. at that time? Did the books of Furness, Brinley & Co., at that time, accurately set forth all their business transactions, including the amounts withdrawn by the several partners therein? If not, why did they not do so, and in what particulars were they wanting? When were the books of Furness, Brinley & Co. last settled up prior to
10 the first day of July, 1877? What was the balance due Edward L. Brinley then? What were the amounts of the annual withdrawals of Edward L. Brinley on account of alleged profits otherwise from said firm of Furness, Brinley & Co. since said last settlement? If said last settlement occurred subsequent to the year eighteen hundred and seventy-three, annex a statement of the annual withdrawals as aforesaid of the said Edward L. Brinley from said firm since the last mentioned date. How was the sum of twenty-five thousand dollars arrived at as the amount to be paid to Mr. Edward L. Brinley on account of his supposed interest in said firm? What was the object of making the dissolution as of July first, eighteen hundred and seventy-seven, and not announcing it until six months thereafter? Who proposed this, and what was said about it? How much of the said sum of twenty-five thousand dollars has been paid to the said Edward L. Brinley, and in what amounts, and upon what dates particularly, were said payments made? And still more particularly, from what source or sources were the funds obtained with which said payments were severally made?

4. What capital had the said copartnership of Furness, Ash & Co. at the time of the commencement thereof, or at any time thereafter, and from what source or sources particularly was it derived? What capital was Edward L. Brinley given to understand by any one, and who, that it had or would have. Other than obtaining the discount of a large amount of commercial paper, what was the amount of the business transacted by Furness, Ash & Co., and what was the amount, and how incurred of the loss therein? Is not said firm last named insolvent? if yea, what are the causes of its insolvency? Is not the indebtedness thereof truly set forth in the stating part of this bill? When was the same contracted? For what pur-
11 pose was the money and every part thereof obtained, represented in the indebtedness for borrowed money or discount of commercial paper, set forth in said list of creditors? For what purpose particularly was it used? To what extent was it used in paying, settling, or arranging indebtedness of Furness, Brinley & Co.? To what extent was indebtedness of Furness, Brinley & Co. paid, settled, or arranged, by or through the commercial paper of Furness, Ash & Co., or proceeds of discounts thereof? Has not the said firm of Furness, Ash & Co. made a voluntary assignment in trust for their creditors, and when to the defendant, George D. Krumbhaar? What assets have came into the hands of said assignee,

and what is their value? Did Furness, Ash & Co. ever pay one of their notes?

5. After or before the first day of January last (1878), and when did the said Edward L. Brinley say to any person or persons, and whom, that he had "withdrawn his capital from the firm of Furness, Brinley & Co., as they had no further use for it," or that "the said firm of Furness, Ash & Co. were good," or did he make to any one, and whom, any statement or statements of like or similar import, or make any statement or express any opinion as to the financial strength or business of Furness, Ash & Co.? If yea, for what purpose were said statements or expression of opinion made?

And that inquiry may be had as to and an account taken of the extent to which the moneys, credit, or assets of the aforesaid copartnership of Furness, Ash & Co. have been used or applied in paying, settling, or arranging indebtedness at any time of the aforesaid copartnership of Furness, Brinley & Co., and that the defendants herein, members of the said copartnership of Furness, Brinley & Co., may be ordered and decreed to repay the amount thereof, either into the registry of your honorable court or to the defendant, George D. Krumbhaar, assignee of the said firm of Furness, Ash & Co. as aforesaid, to be distributed according to law.

12 And that like inquiry may be had and account taken as to the extent which the money, credit, or assets of the said firm of Furness, Ash & Co. have been used or applied in procuring the means for or making the payments to the defendant, Edward L. Brinley, provided for in the writing aforesaid of October twenty-second last (1877), and the said Edward L. Brinley may be ordered and decreed to pay the amount thereof either into the registry of your honorable court, or to the defendant, George D. Krumbhaar, assignee as aforesaid of Furness, Ash & Co., to be distributed according to law.

And that an inquiry may be had as to the capital, if any, with which the said firm of Furness, Ash & Co. started in business, and as to whether the said firm ever had any reasonable prospect or rational expectation of conducting any legitimate business; and, if not, to ascertain for what purpose the said firm of Furness, Ash & Co. was created, and the business thereof carried on; and if it shall be found that the said last-named firm was created and the business thereof carried on for the purpose of enabling the said Edward L. Brinley to fraudulently escape his personal and individual liability to the creditors of the firm of Furness, Brinley & Co., that then the said Edward L. Brinley may be held and treated as really a copartner in the aforesaid firm of Furness, Ash & Co., and may be ordered and decreed, upon an account taken of the assets of said firm, to make good to the complainants, and other creditors of Furness, Ash & Co., the amount of the debts due them respectively by said firm.

And that the complainants may have such further and other relief as to your honors may seem meet, and the nature of their case may seem to require.

May it please your honors to grant unto your orators a writ of subpœna, to be directed to the said James T. Furness, Edward L.

Brinley, Joshua P. Ash, William H. Ash, Dawes E. Furness,
13 Henry Day, and George D. Krumbhaar, thereby commanding them, and every of them, at a certain day and under a certain pain, to be therein limited, personally to be and appear before your honorable court, and then and there full, true, direct, and perfect answer make to all and singular the premises; and further, to stand to, perform, and abide such further order, direction, and decree therein as to your honors shall seem meet. And your orators will ever pray, &c.

NATHAN H. SHARPLESS,
Solicitor for Complainants.

Philadelphia, July 13, 1878.

The defendants, James T. Furness, Edward L. Brinley, Joshua P. Ash, William H. Ash, Henry Day, and Dawes E. Furness, are required to answer the several interrogatories hereinbefore exhibited and numbered 1, 2, 3, 4, and 5.

The defendant, George D. Krumbhaar, is only required to answer the interrogatory hereinbefore exhibited, numbered 4.

N. H. SHARPLESS,
Solicitor for Complainants.

(Endorsed:) No. 86. April session, 1878. In the circuit court of the United States, eastern district of Pennsylvania. In equity. The Penn National Bank, suing, &c., James T. Furness, Edward L. Brinley, *et al.* Bill. Filed July 13, 1878. Nathan H. Sharpless, of counsel.

14 And afterwards, to wit, on the 16th day of September, A. D. 1878, the defendants, James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness, by their solicitors, Chapman Biddle and Charles Hart, Esqs., come into our said court here and file of record their answer to the aforesaid bill, which said answer being read, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania.

THE PENN NATIONAL BANK
vs.
JAMES T. FURNESS *et al.*
} In Equity.

The joint and several answer of James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness, to the bill of complaint of the Penn National Bank, complainant.

These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had to the many errors, uncertainties, and other imperfections in said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised, is or are material or necessary for them to make answer unto, answering, say:

1. They admit that prior to January 1st, 1878, James T.
15 Furness, Edward L. Brinley, Joshua P. Ash, Henry Day, William H. Ash, and Dawes E. Furness were copartners, trading under the name and style of Furness, Brinley & Co., and doing business in the city of Philadelphia as auctioneers, selling goods on commission, and making advances on consignments. They also admit that from an examination and settlement of the books made since the fifteenth day of March, 1878, on which last day the firm of Furness, Ash & Co., successors of the firm of Furness, Brinley & Co., failed, it now appears that the firm of Furness, Brinley & Co. were insolvent on the first day of July, 1877. They do not admit, however, that the said James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness were on that day insolvent as to their individual estates, but believe, on the contrary, that their individual estates were on that day sufficient to meet all the liabilities of the firm of Furness, Brinley & Co.

2. They also admit that on the twenty-second day of October, 1877, Edward L. Brinley, James T. Furness, and Joshua P. Ash did make the agreement set forth in the second paragraph of plaintiff's bill, and that on the first day of January, 1878, James T. Furness, Joshua P. Ash, and William H. Ash continued business at the old stand as the successors of Furness, Brinley & Co., trading under the name and style of Furness, Ash & Co., until the fifteenth day of March, 1878, when the failure of the last-named firm occurred.

3. The circumstances under which the agreement of October, 1877, was made are these: During that month Mr. Brinley expressed to James T. Furness his wish to retire from the firm, to which the latter made no objection. Mr. James T. Furness, at the request of Mr. Brinley, made a calculation of the probable amount to which
16 he, Mr. Brinley, was on that day entitled to receive from the firm, and communicated the information to Mr. Brinley. The latter subsequently drew up the aforesaid agreement and presented it for the signature of James T. Furness and Joshua P. Ash. When presented to Mr. Ash the latter remarked that he knew nothing about the books, that department being exclusively under the control of James T. Furness, but that if Mr. Furness said that the amount therein stated was correct, he, Ash, would sign it at once. Mr. Furness, being thus appealed to, said that he believed the amount was entirely correct, whereupon Mr. Ash appended his signature.

The fact that Mr. Brinley's withdrawal was to be announced on January 1st, 1878, was due to the following reason: It had always been the custom in the firm of Furness, Brinley & Co., and all the firms of which they were the successors, to have withdrawals to date from the beginning of a quarter. The parties believing themselves to be entirely solvent had no reason at that time to depart from that custom, and therefore complied with it. An additional reason which influenced the adoption of this course was that Henry Day and Dawes E. Furness had retired from the firm on October 1st, 1877, and public announcement thereof had been made by advertisement in the newspapers. It was not deemed best, so soon thereafter, to announce another dissolution. The suggestion to this effect came

exclusively from James T. Furness, who was influenced by the considerations above mentioned, and was simply acquiesced in by Mr. Brinley. The reason why the withdrawal was to date as of July 1st, 1877, was that Henry Day's withdrawal having been as of that day Mr. Brinley expressed a wish that his should be considered as of the same date, to which Mr. Furness at once acceded, having no reason, at that time, to question its propriety.

4. They also admit that the books of Furness, Brinley & Co. did not, on the first day of July, 1877, show the true condition
17 of the firm, of which the following is the explanation: It had always been the habit of all the members of the firm whenever, from time to time, they needed money to meet their current expenses, to draw the same, and as these sums varied greatly and were mostly very small in amount, they were charged on slips of paper and sometimes on a memorandum book, with the intention, subsequently, to charge the aggregate to the individual account of the respective partners. This was neglected to be done, and is the one particular in which the firm books did not accurately set forth the affairs of the partnership. James T. Furness was the senior member of the firm and head of the house, and had the exclusive control of the books. None of the other members took any part in the supervision of the same, and had committed this department to his individual care. The responsibility for any neglect, as above set forth, is solely his, and he assumes the same as an act of simple justice to each and all of his partners. It had always been his intention to charge these sums in the books, but he put it off from time to time. This was done without any wish or effort to conceal the fact from the partners. At the same time they were not familiar with the fact, nor did James T. Furness know to what extent the books were deficient as to accuracy in this respect until revealed to him by an examination made after the failure of Furness, Ash & Co.

5. The defendants, James T. Furness and Joshua P. Ash, deny absolutely and without any qualification or evasion the charge made in the fifth paragraph of plaintiff's bill, of fraudulent combination with Edward L. Brinley to dissolve the aforesaid partnership of Furness, Brinley & Co. The circumstances attending the dissolution have already been narrated. James T. Furness believed Edward L. Brinley to be entitled to at least as much as specified in the agreement of October 22d, 1877. He so stated, in good faith,
18 to Joshua P. Ash, who, relying upon that statement, did not hesitate for a moment to affix his signature thereto. They deny most positively, in which denial William H. Ash, the remaining member of the firm of Furness, Ash & Co., joins, that they had any intention to permit Edward L. Brinley to withdraw one dollar more than he or they honestly believed that he was entitled to, and deny as positively that the firm of Furness, Ash & Co. was created for the purpose of enabling them to carry out this fraudulent purpose or any other fraudulent or dishonest purpose or scheme. The firm of Furness, Ash & Co. was formed to continue the same business in which the members and their predecessors had engaged for

more than sixty years. Their purpose was the same; it was meant to be carried out in good faith, and it was expected and believed that they would secure the same measure of success as had always previously attended the business.

The said defendants, further answering, say:

To the first interrogatory:

The firm of Furness, Brinley & Co. on the first day of July, 1877, was composed as set forth in the stating part of complainant's bill. On that day there was an agreement in existence between four of the partners, a copy of which is hereto annexed and marked Exhibit A, which defendants pray may be taken as part of this answer. There was another paper also in existence, which set forth the terms upon which William H. Ash and Dawes E. Furness were admitted into the firm on July 1st, 1872. This paper was never in fact executed, but accurately expressed their interest in the firm. A copy of it is annexed, marked Exhibit B, and defendants pray that it may be taken as part of this answer.

To the second interrogatory:

By an examination of the books made since the failure of
19 Furness, Ash & Co. it appears that the copartnership of Furness, Brinley & Co. was insolvent on July 1st, 1877. This was unknown to the partners at that date, and resulted from debts due the firm, which afterwards proved worthless and the general prostration of business. The individual partners as to their private estates were solvent. The debts or liabilities of Furness, Brinley & Co. on July 1st, 1877, are set forth, as nearly as can be ascertained, in a statement hereto annexed, marked Exhibit C. Their liabilities on January 1st, 1878, are set forth in a statement hereto annexed, marked Exhibit D, both of which exhibits defendants pray may be taken as part of this answer.

Of these liabilities all that have been paid since January 1st, 1878, were paid by Furness, Ash & Co., as successors of Furness, Brinley & Co. The sources from which the funds were derived to make these payments were discounts of bills receivable, received by Furness, Brinley & Co. for goods sold, negotiations of the commercial paper of Furness, Ash & Co., cash settlements for goods sold by Furness, Brinley & Co., and loans obtained. The firm assets of Furness, Brinley & Co. on July 1st, 1877, were about $60,000. These were applied, from time to time, in settlement of the indebtedness of Furness, Brinley & Co., and what remained was passed over to George D. Krumbhaar, assignee, and appraised at $5,685.52.

To the third interrogatory:

The writing, dated October 22d, 1877, is correctly stated in complainant's bill. Taking the amount standing to the credit of Edward L. Brinley and deducting therefrom memoranda in drawer, representing sums withdrawn by him at various times, and also deducting one-fourth of the existing losses, there would then remain to his credit the sum of $23,557.74 on July 1st, 1877. Had he gone
out October 22d, 1877, an examination of the books shows
20 that there would have been to his credit about $20,000. The books of Furness, Brinley & Co. did not show the amount

withdrawn by all the partners. The sums so withdrawn by James T. Furness, Edward L. Brinley, and Joshua P. Ash were stated on memoranda kept in the drawer, and intended to be charged to their respective accounts as these accumulated; but James T. Furness, who had charge of the books, neglected so to do; but of this his partners had no knowledge. This was the only particular in which the books were inaccurate. Prior to July 1st, 1877, the books had been settled up in February, 1875, and the balance on the books to the credit of Edward L. Brinley on that day was $47,771.51. The annual withdrawals of Edward L. Brinley since that date averaged between six and seven thousand dollars.

These withdrawals were, as before explained, represented by memoranda in the drawer without date, and the aggregate alone can be given. The sum of $25,000 was arrived at by James T. Furness as the sum to which he believed Edward L. Brinley entitled by taking the sum to his credit on the books and deducting therefrom the sums chargeable to him, as contained on the memoranda in the drawer, and further deducting his share of the then supposed losses. James T. Furness cannot recollect that anything in particular was said by him to Edward L. Brinley about announcing the dissolution on January 1st, 1878. The reasons which influenced Mr. Furness have already been stated. He has no recollection of what Mr. Brinley may have said in answer to that suggestion, but, to the best of his recollection and belief, Mr. Brinley simply acquiesced. There was no discussion whatever on the subject. The following payments were made to Edward L. Brinley on account of the agreement of October 22d, 1877:

December 1st, 1877	$5,000
December 31, 1877	5,000
February 1st, 1878	5,000
March 6th, 1878	5,000

21 The first payment was made by two checks of $2,500 each, one on the Central Bank and the other on the Commercial Bank, of this city.

The second payment was by check on the Commercial Bank, the third payment by check on the Bank of North America, and the last payment by check on the Central Bank, all of this city. The sources from which funds were derived to meet the payments were discounts of bills receivable, proceeds received from negotiations of the commercial paper of Furness, Brinley & Co., and of Furness, Ash & Co., cash settlements for goods sold, and loans obtained. The moneys received from these sources went indiscriminately into cash and were drawn against. It is impossible to trace more specifically which of these sources furnished the means for either of these four payments.

To the fourth interrogatory:

The capital of Furness, Ash & Co., on January 1st, 1878, consisted of $10,252.44 in cash, $36,000 in bills receivable and open accounts, and about $2,000 in remaining assets. No one ever gave Edward

L. Brinley to understand what the capital of Furness, Ash & Co. would be or subsequently was. There never was any conversation between Edward L. Brinley and any of the defendants on this subject. The business of Furness, Ash & Co. consisted of sales of merchandise to the extent of $12,810.80. They met with no loss except one note for $465.23 and a small bill for $28.40. The last-named firm is insolvent, and the causes of its insolvency are traceable to the large liabilities of Furness, Brinley & Co. falling upon Furness, Ash & Co. as the successor firm, the insufficient capital of the latter to meet the same, and the great prostration of business. The indebtedness of Furness, Ash & Co. is truly set forth in complainant's bill. It was all contracted, since January 1st, 1878, except the sums due to R. Rogers, F. H. Haven, and W. Eck-
22 stein, and the sum due to E. L. Brinley, which was the balance to his credit on the books. Defendants cannot state more specifically than they have already done to what extent the indebtedness of Furness, Brinley & Co. was settled by proceeds from the sale of the commercial paper of Furness, Ash & Co. James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness did make an assignment for the benefit of their creditors on the eighteenth day of April, 1878. The assets that went into the assignee's hands are contained on a list hereto annexed, marked Exhibit E, which defendants pray may be taken as part of this answer.

To the fifth interrogatory:

The defendants say that they never heard Edward L. Brinley make use of any of the expressions mentioned in this interrogatory, or of any expressions of like import, or of any expressions directly or indirectly calculated to convey any such meaning. Nor have they any knowledge, nor have they any reason to believe from anything which they ever heard prior to the failure of Furness, Ash & Co., that Edward L. Brinley ever made any statement or expressed any opinion as to the financial strength or business of Furness, Ash & Co.

And these defendants severally deny all and all manner of unlawful combination and confederacy as by the said bill charged, without this, that there is any other matter, cause, or thing material or necessary for these defendants to make answer unto and not herein sufficiently answered; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be
23 hence dismissed, with their reasonable costs and charges in this behalf wrongfully sustained.

JAMES T. FURNESS.
JOSHUA P. ASH.
WM. H. ASH.
DAWES E. FURNESS.

James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness, being severally sworn, depose and say: That the facts set forth in the foregoing answer are true, so far as stated on their

withdrawn by all the partners. The sums so withdrawn by James T. Furness, Edward L. Brinley, and Joshua P. Ash were stated on memoranda kept in the drawer, and intended to be charged to their respective accounts as these accumulated; but James T. Furness, who had charge of the books, neglected so to do; but of this his partners had no knowledge. This was the only particular in which the books were inaccurate. Prior to July 1st, 1877, the books had been settled up in February, 1875, and the balance on the books to the credit of Edward L. Brinley on that day was $47,771.51. The annual withdrawals of Edward L. Brinley since that date averaged between six and seven thousand dollars.

These withdrawals were, as before explained, represented by memoranda in the drawer without date, and the aggregate alone can be given. The sum of $25,000 was arrived at by James T. Furness as the sum to which he believed Edward L. Brinley entitled by taking the sum to his credit on the books and deducting therefrom the sums chargeable to him, as contained on the memoranda in the drawer, and further deducting his share of the then supposed losses. James T. Furness cannot recollect that anything in particular was said by him to Edward L. Brinley about announcing the dissolution on January 1st, 1878. The reasons which influenced Mr. Furness have already been stated. He has no recollection of what Mr. Brinley may have said in answer to that suggestion, but, to the best of his recollection and belief, Mr. Brinley simply acquiesced. There was no discussion whatever on the subject. The following payments were made to Edward L. Brinley on account of the agreement of October 22d, 1877:

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The second payment was by check on the Commercial Bank, the third payment by check on the Bank of North America, and the last payment by check on the Central Bank, all of this city. The sources from which funds were derived to meet the payments were discounts of bills receivable, proceeds received from negotiations of the commercial paper of Furness, Brinley & Co., and of Furness, Ash & Co., cash settlements for goods sold, and loans obtained. The moneys received from these sources went indiscriminately into cash and were drawn against. It is impossible to trace more specifically which of these sources furnished the means for either of these four payments.

To the fourth interrogatory:

The capital of Furness, Ash & Co., on January 1st, 1878, consisted of $10,252.44 in cash, $36,000 in bills receivable and open accounts, and about $2,000 in remaining assets. No one ever gave Edward

L. Brinley to understand what the capital of Furness, Ash & Co. would be or subsequently was. There never was any conversation between Edward L. Brinley and any of the defendants on this subject. The business of Furness, Ash & Co. consisted of sales of merchandise to the extent of $12,810.80. They met with no loss except one note for $465.23 and a small bill for $28.40. The last-named firm is insolvent, and the causes of its insolvency are traceable to the large liabilities of Furness, Brinley & Co. falling upon Furness, Ash & Co. as the successor firm, the insufficient capital of the latter to meet the same, and the great prostration of business. The indebtedness of Furness, Ash & Co. is truly set forth in complainant's bill. It was all contracted since January 1st, 1878, except the sums due to R. Rogers, F. H. Haven, and W. Eck-
22 stein, and the sum due to E. L. Brinley, which was the balance to his credit on the books. Defendants cannot state more specifically than they have already done to what extent the indebtedness of Furness, Brinley & Co. was settled by proceeds from the sale of the commercial paper of Furness, Ash & Co. James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness did make an assignment for the benefit of their creditors on the eighteenth day of April, 1878. The assets that went into the assignee's hands are contained on a list hereto annexed, marked Exhibit E, which defendants pray may be taken as part of this answer.

To the fifth interrogatory:

The defendants say that they never heard Edward L. Brinley make use of any of the expressions mentioned in this interrogatory, or of any expressions of like import, or of any expressions directly or indirectly calculated to convey any such meaning. Nor have they any knowledge, nor have they any reason to believe from anything which they ever heard prior to the failure of Furness, Ash & Co., that Edward L. Brinley ever made any statement or expressed any opinion as to the financial strength or business of Furness, Ash & Co.

And these defendants severally deny all and all manner of unlawful combination and confederacy as by the said bill charged, without this, that there is any other matter, cause, or thing material or necessary for these defendants to make answer unto and not herein sufficiently answered; all which matters and things these defendants are ready and willing to aver, maintain, and prove as this honorable court shall direct, and humbly pray to be
23 hence dismissed, with their reasonable costs and charges in this behalf wrongfully sustained.

JAMES T. FURNESS.
JOSHUA P. ASH.
WM. H. ASH.
DAWES E. FURNESS.

James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness, being severally sworn, depose and say: That the facts set forth in the foregoing answer are true, so far as stated on their

knowledge; and so far as stated from information derived from other sources, they believe them to be true.

JAMES T. FURNESS.
JOSHUA P. ASH.
WM. H. ASH.
DAWES E. FURNESS.

Sworn to and subscribed before me, this 16th day of Sept., 1878.
[SEAL.] HENRY PHILLIPS, JR.,
U. S. Commissioner.

24 EXHIBIT A.

Whereas Furness Brinley & Co. did, on the first day of July, 1851, associate with them a new partner to carry on the auction and commission business, under the same title of Furness, Brinley & Co.: We, the undersigned, do this day bind ourselves by the following agreement: Either of the partners are at liberty to dissolve the house by giving three months' notice in writing to the others, prior to a settling end of a quarter year; but, in case of death, the copartnership to be dissolved and settled up by the survivors as soon as possible, and their respective shares, according to the accounts to be kept in the books, paid to each of them or their legal representatives; but, in case of dissolution, James T. Furness and Edward L. Brinley, or the survivor of them, shall have the option of keeping the stores they occupy, the fixtures, furniture, and all other articles in use in said stores and counting-houses, together with all the books and papers, rendering and paying for the said fixtures, furniture, books, and papers to the old firm the value thereof, as near as can be ascertained by the cost and wear and tear thereof, but shall not allow or be chargeable with anything for what is termed the good will of the stores, or for the customers to them, or for the customers of the said old firm.

Regular books are to be kept in which all the business or transactions of the said firm are to appear. James T. Furness, Edward L. Brinley, and Joshua P. Ash are each to put into and keep in the said firm, as their equal portions of capital, twenty thousand dollars each, without interest, and to go to their individual credits in the said books. It is also agreed that, as Mr. Henry Day does not contribute any capital, he is to be charged interest in the books of Furness,
Brinley & Co. upon the sum of twenty thousand dollars, or
25 upon such an amount as may stand to his debit short of that
sum in the books after the maturity of six months' business. It is also understood that the said Day is not to take out or use any more money than may be necessary for the support of his family, until the sum of twenty thousand dollars comes to his credit. No division of profits is to be made until the expenses of the firm are first paid. Each partner is to receive one-fourth part of the net profits as his portion, and to bear one-fourth part of the losses.

(Signed) JAMES T. FURNESS.
EDWARD L. BRINLEY.
JOSHUA P. ASH.
HENRY DAY.

Philadelphia, July 1st, 1851.

26 EXHIBIT B.

It is herewith understood and agreed between the undersigned, the present firm of Furness, Brinley & Co. and William H. Ash and Dawes E. Furness, who are this day admitted as partners to an interest in the auction and commission business on the following terms:

William H. Ash is to receive semi-annually three-eighths of one per cent. on the gross amount of sales, excepting on the amount of bad debts. Then the three-eighths of one per cent. shall be calculated on the amount of dividends received from any losses which may occur.

On all other sums William H. Ash is to receive three-eighths of one per cent. Dawes E. Furness is also to receive the same percentage, and on the same terms as specified above.

It is also understood that William H. Ash and Dawes E. Furness are not to be held liable for any abatement on this percentage, excepting as named above.

It is also understood that the present firm of Furness, Brinley & Co. retain all their rights of the good will of the business, fixtures, &c., independent of William H. Ash and Dawes E. Furness; and either one of the partners, both of the old house and the new, are at liberty to dissolve and annul this agreement of partnership by giving to the firm a notice of three months of such desire.

It is also agreed that the new partners will give their time and attention to the business the same as they have done heretofore.

27 EXHIBIT C.

List of Liabilities of Furness, Brinley & Co., July 12th, 1877.

Wright, Bros. & Co., sales	$485 16
Werner, Itschner & Co., "	2,312 00
Benkard & Hutton, "	19,461 13
Smith, Oscar L., salary	28 86
Samuel Vile, money on deposit	1,000 00
Wm. Eckstein, " "	1,600 00
Rebecca Rogers, " "	600 00
Joseph Vile, " "	1,000 00
Robert H. Small, " "	10,000 00
E. S. & J. P. Haff, sales	7 75
Emma Wiler, money on deposit	2,000 00
Hannah Hoffman, " "	2,000 00
Ann H. Haven, " "	129 51
F. H. Haven, " "	5 50
Glass, Bros. & Co., sales	85 62
M. A. Wolfang, money on deposit	250 00
W. H. Furness, trustee, money on deposit	700 00
Central Bank, due-bill	7,000 00
Commercial Bank, "	6,500 00
" " "	10,000 00
Newgarden Bros., "	484 85

Wm. Lynch & Co., due-bill	$623 33
Newgarden Bros., "	471 18
Krieger & Bro., "	178 05
" " "	418 82
" " "	269 11
Lynch & Co., "	997 13
Bills payable, passed over to W. H. Newbold's Son & Co. for negotiation for the benefit of the firm	21,502 16
	$90,110 16

28 EXHIBIT D.

List of Liabilities of Furness, Brinley & Co., January 1st, 1878.

Wright, Bros. & Co., sales	$760 71
Werner, Itschner & Co., sales	4,623 14
Benkard & Hutton, sales	11,491 44
E. Oelbermann & Co., sales	8,529 03
Sundry sales through Nov. and Dec. not paid	2,500 00
Samuel Vile, money on deposit	1,000 00
Rebecca Rogers, " "	600 00
R. W. Small, " "	20,000 00
Emma Wiler, " "	2,000 00
Hannah Hoffman, money on deposit	2,000 00
F. H. Haven, " "	922 00
Wm. Eckstein, " "	1,800 00
M. A. Wolfang, " "	250 00
W. H. Furness, trustee, money on deposit	700 00
W. H. Newbold's Son & Co., due-bill	4,000 00
Commercial Bank, "	8,000 00
Bills payable passed over to Newbold's Son & Co. for negotiation for benefit of the firm	31,434 97
Sundry due-bills, viz:	
May & Bro., $206.88; Nunes & Britain, $1,295.20; C. H. Miller, $263.65; D. Herzman, $202.01; Newgarden & Bro., $405.43; W. S. Stewart, $987.50; May & Bro., $225.10; Nunis & Britain, $392.78 and $1,050.57; M. J. Bell, $110.30; Reber & Ulric, $358.03; L. Stein, $619.07 and $238.80	6,355 32
	$106,966 61

29 EXHIBIT E.

Items of Assigned Estate.

	Appraised Value.
Personal property of James T. Furness	$26,029 30
" " " Joshua P. Ash	13,240 00
" " " W. H. Ash	5,012 00
" " " D. E. Furness	1,688 05
Bills receivable of F., A. & Co.	2,133 30

Cash	$5,650 11
Bills to collect	183 41
Fixtures in store, 615 Chestnut street	192 40
Bills receivable of Furness, Brinley & Co.	500 00
Insurance policies	1,800 00
Ledger account	1,000 00
Bills receivable in suit, &c.	2,386 47
	$59,865 04
Balance due by H. Day	4,128 58
	$63,943 62

30 (Endorsed:) No. 86. April sessions, 1878. Circuit court of the United States, eastern district of Pennsylvania. In Equity. The Penn National Bank *vs.* James T. Furness *et al.* Answer of James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness. Filed September 16, 1878.

31 And afterwards, to wit, on the 8th day of October, A. D. 1878, the defendant, Edward L. Brinley, by his solicitor, Samuel Dickson, Esq., comes into our said court here and files of record his answer to the aforesaid bill, which, being read, is as follows, to wit:

Circuit Court of the United States for the Eastern District of Pennsylvania, in the Third Circuit.

The Answer of Edward L. Brinley to the Bill of Complaint of the Penn National Bank, Complainant.

This defendant, reserving all manner of exceptions, for answer to the complainant's bill of complaint, answering, says:

First. I admit that prior to January 1st, 1878, James T. Furness and others were carrying on business with myself, under the name and style of Furness, Brinley & Co., in Philadelphia; but I deny that the insolvency of said firm manifestly appeared upon its books of account.

Second. I admit that the agreement set out in Article II was executed on or about the day of its date. At that time I believed that the statement of facts therein contained was true and correct, and that my capital in the firm was at least $25,000. By the articles of partnership, dated July 1st, 1851, each of the partners was required to pay into and to keep in the said firm a capital stock
32 of $20,000. I had intended to do so, and in fact did do so; and at that time I not only supposed the firm to be solvent, but believed that my partners had large individual estates. Mr. Furness had been a partner in the house from the year 1837, and I entered it in 1838; and having been able to accumulate some property myself, I believed him to be worth upwards of $100,000; and I also believed that Mr. Ash had a large individual estate.

Third. I have no personal knowledge of the liabilities of Furness, Ash & Co.

Fourth. I knew nothing of the manner in which the firm of Furness, Ash & Co. was carrying on its business. I believed the firm to be solvent. I did not actively promote the negotiation and discount of its commercial paper by statements made in the money markets of the city of Philadelphia, nor in any other way. I did not make any representations in respect to the solvency of the firm of Furness, Ash & Co., with a view of having them acted upon, nor in such a way that any one had the right to act upon them. It is quite likely that I may have expressed the opinion that the firm was good, as such was my own belief; but I said nothing that was intended to come, even if in fact it did come, to the ears of the complainant and others, and I have no recollection of ever having said anything on the subject, while it is hardly credible that business men, supposed by their fellows to have sufficient intelligence and capacity to manage a bank, would give credit upon random gossip of that sort. There was no privity whatever between them and myself; they never made any inquiry of me, and I never made any statement that I did not believe to be absolutely true; nor did I ever make any statement with the intention or expectation that it would come to their knowledge.

33 Fifth. The charges contained in the fifth section of the bill are simply false and scandalous, and there is not the slightest excuse for uttering any such slanders, as they are as incredible and absurd as they are unfounded.

The facts in regard to the dissolution were briefly that, in consequence of my impaired health and advanced years, I had gradually withdrawn from any active participation in the business of the firm, spending generally about four months of the year at Newport, and during the summer of 1877, while at Newport, I was informed by letter from Mr. Furness that Mr. Day had been notified that the firm would be dissolved on the 1st of October, and Mr. Ash subsequently wrote that he had told Mr. Day he might go out earlier if he wished. I heard that my partners were dissatisfied with Mr. Day's neglect of the business, and though not consulted in the matter, I approved of his being thus virtually requested to withdraw. I never had any communication with Mr. Day himself on the subject, with the possible exception of a letter from him, though as to this my recollection is not clear. There were no written articles of dissolution, nor was there any assumption of the liabilities of the firm, so far as I am aware, by the continuing partners, and as Mr. Day had agreed to keep up his capital of $20,000, I supposed that he had at least that amount to his credit after provision had been made for all the liabilities of the firm; but upon inquiring as to the amount that he took out with him, I was told that he only had some $7,000 or $8,000 to his credit, and that the other partners had also failed to keep up their contributions of capital, but that mine was still intact. I then expressed my desire to withdraw my capital, and my partners seemed perfectly willing to have me do so, but asked that the announcement should not be made until the first of the following January, and as a matter of friendship I consented; and it was further agreed that the dissolution should

34 take effect as of the 1st of July. As has been already stated, my understanding at the time was that Mr. Day had left at the request of Mr. Furness or Mr. Ash; and if I had formed any suspicion as to the solvency of the firm, I should have been reassured by this fact, as Mr. Day was known to be a man of considerable fortune. For myself I neither made nor authorized any agreement to assume the debts as against him. On the contrary, our agreement of dissolution was based on the theory that Mr. Day and myself had each a credit balance after providing for all the debts, and when I proposed to Mr. Furness to leave about $4,000 to cover contingencies, he replied that Mr. Day had left about that same amount, though in this he seems to have been in error, as Mr. Day's account was overdrawn some four or five thousand dollars. After the failure of the firm I discovered that the assets of Furness, Brinley & Co. were practically all gone, and that there were still outstanding liabilities to the amount of nearly $40,000. I immediately arranged to sell my securities and to mortgage my dwelling-house here and that in Newport, to take up these claims as they matured, expecting that my partner, Mr. Day, who was equally liable with me, would pay his share. But he has kept out of the jurisdiction, and interposed every possible difficulty in the way of creditors who have sought to make collections from him. I have already paid out more than I received after the dissolution, and am liable for some thousands additional. And in explanation of my ignorance of the true condition of the affairs, I would state that I was never an accountant, but always depended upon Mr. Furness to manage the finances of the firm, and even to look after my own private affairs; the business had always been fairly profitable, and no heavy losses had been incurred. After the failure Lucas E. Burke, Esq., the accountant, was employed to examine the books of the late firm, and to make an adjustment of the accounts of the part-
35 ners as they stood on July 1st, 1877; that statement showed that if the individual accounts of my copartners had been made good there would have been to my credit $24,891.70; and if I had examined the books at the time, the individual accounts would not have shown that they had been overdrawn.

All these facts could have been ascertained by the complainant, and I submit, therefore, that there is no excuse for the wanton and malicious slanders contained in the fifth section of the bill.

And, further answering, I say, in answer to the first interrogatory, that the firm of Furness, Brinley & Co. was composed as stated in the papers annexed to the answer of J. T. Furness and others. The liabilities of Furness, Brinley & Co. exceeded the firm assets, as I am informed and believe, by about $32,000; but, as already stated, if the individual accounts of J. T. Furness and J. P. Ash had been made good, there would have been about $25,000 coming to me after the payment of the firm's debts. A part of the liabilities of the firm of Furness, Brinley & Co., remaining unpaid on March 15th, 1878, have been paid by me out of my private means, obtained from a sale and mortgage of my individual property. As to the other matters contained in this interrogatory, I have no personal knowledge.

To the third interrogatory I would answer, that the writing dated October 22d, 1877, was made and executed, and that there was due to me on July 1st, 1877, the sum of $24,891.70 or more. I am informed that the books do not show the amounts withdrawn; but they were in the exclusive charge of Mr. Furness, and I accepted the statement of Mr. Furness that the sum of $25,000 was due to me; and I received $20,000 on account, as stated in the answer of the other defendants. I asked that the dissolution should be made, to take effect as of July 1st, because I was told that Mr. Day was
36 to retire on that date, and I supposed that the firm had made little or nothing during the summer months. I have no knowledge as to the sources from which the payments were made.

To the fourth interrogatory I would answer, that I have no personal knowledge of any matter inquired of relevant to the subject-matter of suit.

To the fifth interrogatory I would answer, that I have no recollection of having said that I had withdrawn my capital from the firm of Furness, Brinley & Co., as they had no further use for it, or that the said firm of Furness, Brinley & Co. were good, nor that I made any statement or expressed any opinion as to the financial strength of that firm; but it is possible that in general conversation I did express my opinion, which was, that the firm was good. I certainly never said anything calculated or intended to impair the credit of the firm, because I could not have done so truthfully.

But I desire to give a most sweeping, unqualified, and complete denial to the charge or insinuation that I ever made any false statement with a view of bolstering up the credit of that firm; but, as my relations with my late partner were of the most kindly character, and my feelings towards them entirely friendly, if any inquiry were made, I, of course, spoke as I believed and felt; but I never made any statement, so far as I can recollect, in respect of the financial standing of the house, upon which a prudent business man would have thought of acting.

And this defendant, denying all and all manner of unlawful combination and confederacy, as by the said bill charged, without this, that there is any other matter, cause, or thing material or necessary for this defendant to make answer unto, and not herein sufficiently answered; all which matters and things this defendant is ready and willing to aver, maintain, and prove, as this honorable court shall direct, and humbly pray to be hence dismissed, with
37 his reasonable costs and charges in this behalf most wrongfully sustained.

EDW'D L. BRINLEY.

Edward L. Brinley, being duly sworn, deposes and says: That the facts set forth in the foregoing answer, so far as they are stated of his own knowledge, are true, and so far as stated upon information from others, he believes them to be true.

GEO. W. THURSTON, [SEAL.]
Notary Public.

SAM'L DICKSON,
J. C. BULLITT, *Of Counsel.*

38 (Endorsed:) No. 86. April sess., 1878. In the United States circuit court for the eastern district of Pennsylvania, in the third circuit. The answer of Edward L. Brinley to the bill of complaint of the Penn National Bank, complainant. Sam'l Dickson, J. C. Bullitt, of counsel. Filed October 9, 1878.

39 And afterwards, to wit, on the 4th day of November, A. D. 1878, the complainants, by their solicitor, come into our said court here and file their replication to the answers of James T. Furness, Edward L. Brinley, Joshua P. Ash, William H. Ash, and Dawes E. Furness, which, being read, is as follows, to wit:

C. C. U. S., E. D. Pa. April Sess., 1878.

PENN NATIONAL BANK, Suing, &c., *vs.* JAMES T. FURNESS *et al.* } No. 86. In Equity.

The replication of the Penn National Bank, suing, &c., complainant, to the answer of James T. Furness, Joshua P. Ash, William H. Ash, Dawes E. Furness, and Edward L. Brinley, defendants.

These repliants, saving and reserving unto themselves all manner of advantage of exception to the manifold insufficiencies of the said answers, for replication thereunto say, that they will aver and prove their said bill to be true, certain, and sufficient in the law to be answered unto, and that the said answers of the said defendants are uncertain, untrue, and insufficient to be replied unto by these
40 repliants, without this, that any other matter or thing whatsoever therein contained material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove, as this honorable court shall direct; and humbly pray as in and by their said bill they have already prayed.

N. H. SHARPLESS,
Of Counsel with Compl'ts

To SAMUEL BELL, Esq., *Clerk C. C. U. S., E. D. of Pa.*

(Endorsed:) 86. April sess., 1878. C. C. U. S., E. D. of Pa. Penn National Bank, suing, &c., *vs.* James T. Furness, Edward L. Brinley, *et al.* Replication to answer of James T. Furness, Edward L. Brinley, Joshua P. Ash, William H. Ash, and Dawes E. Furness. Filed November 4, 1878. Sharpless.

41 And on the day and year last aforesaid the complainants, by their solicitor, come into our said court here and file of record an order for entry of decree *pro confesso* against the defendant, George D. Krumbhaar, which, being read, is as follows, to wit:

C. C. U. S., E. D. Pa. April Sess., 1878.

PENN NATIONAL BANK, Suing, &c., *vs.* FURNESS, BRINLEY, *et al* } No. 86. In Equity.

Enter a decree *pro confesso* against the defendant, George D. Krumbhaar, for want of an answer.

SHARPLESS, *Pl'ff's Att'y.*

Nov. 4, 1878.

To SAM'L BELL, Esq., *Clerk C. C. U. S.*

(Endorsed:) 86. April sess., 1878. Penn National Bank, suing, &c., *vs.* Furness, Brinley, *et al* Order for entry of decree *pro confesso* against the defendant, Geo. D. Krumbhaar. Filed November 4, 1878. Sharpless.

42 And on the day and year last aforesaid the complainants, by their solicitor, appear in open court and move the court for an appointment of an examiner, whereupon the court makes the following order, to wit:

C. C. U. S., E. D. Pa. April Sess., 1878.

THE PENN NATIONAL BANK, Suing, &c., *vs.* FURNESS, BRINLEY *et al.* } No. 86. In Equity.

And now, November 4th, 1878, on motion of Sharpless, for the plaintiffs, the court appoint Sussex D. Davis, Esq., examiner to take the testimony in the above case.

(Endorsed:) 86. April sess., 1878. In equity. C. C. U. S., E. D. of Pa. Penn National Bank, suing, &c., *vs.* Furness, Brinley *et al.* Appointment of examiner. Entered November 4, 1878. Sharpless.

43 And afterwards, to wit, on the 14th day of October, A. D. 1880, the examiner comes into our said court here and files of record his report, which, being read, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania. April Sessions, 1878.

THE PENN NATIONAL BANK, Suing, &c., *vs.* JAMES T. FURNESS, EDWARD L. BRINLEY, JOSHUA P. ASH, HENRY DAY, WILLIAM H. ASH, DAWES E. FURNESS, and GEORGE D. KRUMBHAAR. } No. 86. In Equity.

DECEMBER 17, 1878, at 3½ o'clock p. m.

Present: Joshua P. Ash, one of the defendants, his solicitors, Chapman Biddle, Esq., and Charles Hart, Esq.; Nathan H. Sharpless, Esq., solicitor for complainants, and Charles H. Krumbhaar, Esq., solicitor for George D. Krumbhaar, Esq., voluntary assignee of

James T. Furness, Joshua P. Ash, and William H. Ash, late trading as Furness, Ash & Co., and Henry G. Ward, Esq., assignee in bankruptcy of the above-named James T. Furness, Joshua P. Ash, and William H. Ash.

Adjourned to December 26, 1878, at 3½ o'clock p. m.

44 DECEMBER 26, 1878.

Present: Mr. Biddle, Mr. Hart, Mr. Sharpless, Joshua P. Ash, one of the defendants, and Dawes E. Furness, also one of the defendants.

JOSHUA P. ASH, a witness, called on the part of the complainants, being duly sworn and examined by Mr. SHARPLESS, says: On the first day of January, 1877, James T. Furness, Edward L. Brinley, Joshua P. Ash, Henry Day, William H. Ash, and Dawes E. Furness were the partners in the firm of Furness, Brinley & Co.

These gentlemen all resided in Philadelphia except Mr. Day.

Mr. Day resided in New Jersey, about ten miles above Jersey City. I think he had an office in New York.

The firm had consisted of those members except the two junior members, Dawes E. Furness and William H. Ash, for a great many years. I should say for more than twenty years.

The business of Furness, Brinley & Co. was selling goods at auction, having consignments from Philadelphia and New York.

We made advances on goods. Dawes E. Furness and William H. Ash had come into the firm some three or four years previous to 1877.

The firm had a written agreement of copartnership which was signed.

That is, the old firm of Furness, Brinley & Co. had such an agreement, but not when the younger members came, such an agreement for the junior members was written, but not signed.

Witness holds in his hands the answer of defendants filed, and says:

Exhibit "A," dated July 1, 1851, and Exhibit "B," without date, annexed to our answer filed in this case, are the agreements of co-
partnership of Furness, Brinley & Co. to which I referred.

45 Since the date of Exhibit "A" there have been no other agreements of Furness, Brinley & Co.

I do not remember why Exhibit B was not signed, for I did not know of its existence. I can give no reason. I knew of the arrangement, however. Down to its close I think the business of Furness, Brinley & Co. was conducted according to the terms of these papers.

For about the last ten years or more we carried on business at No. 615 Chesnut street.

After Dawes E. Furness and William H. Ash came into the firm James T. Furness was the financier and book-keeper. Mr. Edward L. Brinley sometimes cried the sales and wrote some business letters. Joshua P. Ash solicited goods in the city and sometimes in New York; cried the sales almost entirely, and had general supervision

of the outside, store, of the clerks, and the goods. Dawes E. Furness assisted his father at the books, and for a short time went to New York to solicit goods.

William H. Ash attended to all the arrangement of the goods for sale, and assisted in soliciting goods in the city.

Henry Day was the solicitor of goods in New York.

Mr. Brinley was usually about the place of business from the 1st of September or October to the 1st of June, coming back from Newport sooner or later in the autumn.

This continued down to the time he remained in the firm.

I do not now remember what capital each member brought into the firm of Furness, Brinley & Co.

I do not remember any member of the firm contributing any considerable amount of capital; it might have been done without my knowing it, but I do not remember.

The firm kept regular books of account to the best of my knowledge.

They were open at all times for the inspection of the members of the firm at the place of business.

46 When the partners desired to draw any money from the firm they would ask Mr. Furness for it, sometimes Dawes E. Furness.

I do not know how much Mr. Brinley drew from the firm the last six years of its existence.

I never had a word of conversation with him on the subject of his drawings.

Balance sheets or trial balances of the firm's business were taken off, but not, I think, for the last year or two. I think the date of the last is in the answer.

I can't give the date they were taken off, but I suppose it was the end of December or the beginning of January.

I can't say whether it was done every year; I never knew much about them, but I should say, as a general thing, it was.

James T. Furness took them off; Dawes E. Furness possibly assisting.

I cannot say what became of those balance sheets. I had nothing to do with the counting-room. I cannot say to whom these balance sheets were exhibited when taken off. I may have seen some some years back.

There was no secrecy about them at all.

Mr. Brinley was in and about the counting-room, though not there as much as some others.

I don't think the subject of the annual profits was ever spoken of; sometimes we would say we were doing a good business, and sometimes we would we were not. We ought to have known how the business was going on.

We could tell the amount of goods we sold, and of course the profits depended on the expenses and bad debts.

After January 1st, 1873, the business was not as it used to be, 1873 or 1874. This was markedly so. There were more bad debts.

I would like to correct that about the bad debts. I can't tell their date. I will try and recollect.

Adjourned to January 2, 1879, at 3½ p. m.

47 JANUARY 2, 1878, at 3½ p. m.

Present: Mr. Sharpless, Joshua P. Ash, one of the defendants, Mr. Biddle, and Samuel Dickson, Esq.

The examination of JOSHUA P. ASH, one of the defendants, being continued by Mr. SHARPLESS, says:

After reflection I think the number of bad debts did increase in 1873 or 1874.

I learned of it I suppose from Mr. Furness, or I would hear of it out in the market of the failures.

It was the subject of conversation among the partners when a failure would take place. Not so much Mr. Brinley as Mr. Furness.

Q. After January 1, 1872, can you tell me about what amount per annum was drawn by the several partners from the firm of Furness, Brinley & Co. on account of their respective shares of the profits thereof?

A. I cannot answer that question; I do not know.

I can come near, I think, as regards myself; it was about $5,000 or $6,000. I can tell nothing about the other partners whatsoever.

I cannot tell whether the withdrawals on account of profits of the respective parners increased or decreased.

The profits decreased from about 1872 on—our business was smaller. I think it is more than likely that I was the cause of Mr. Day's going out of the firm; at least I spoke of his going out. That was, I think, in the latter end of June, 1877. He went out in October, 1877.

I would rather say that instead of saying "I was the cause of Mr. Day's going out," that it was the subject of consultation among the partners.

In June, 1877, Mr. Day telegraphed that he would like us to consent to his going to Europe, I think the next day.

We telegraphed him to get our letter before he sailed. That letter contained a notice to him that the house would be dissolved on October 1st, following.

48 He went to Europe, and when he returned, early in the fall, he came over to Philadelphia and seemed to think it was pretty hard that the house was to be dissolved. The matter was arranged that he should go out.

Mr. Day was a capitalist.

I do not know what steps were taken by Mr. Day about the first of October to ascertain his interest in the firm; he may have spoken to Mr. Furness.

I think, but I am not positive, that he was a debtor to the firm in October to about the amount of $2,500, when he went out, which was increased to about $4,500 on January 1, following. Previous to our failure I know of no efforts to collect those amounts. There have been such efforts since.

He did not solicit consignments for us in Europe; he did not go on our business.

About October 1, 1877, when the firm was dissolved, I saw him in the office talking to Mr. Furness.

I heard him say he did not want to go out.

He said it to both Mr. Furness and myself.

I think he wrote a letter to Mr. Brinley in answer to our letter of June; it was mailed from Europe. I may be wrong, but I have that impression.

He offered to buy me out, and offered to buy Mr. Brinley out. Mr. Brinley was not present.

Mr. Furness thereupon showed him some statement of bad debts. I think he spoke of bad debts; there was no statement.

We declined to sell out to him, and I told him I did not think Mr. Brinley would sell out. He said then that if he must go out he would go out as of the first of July.

I do not know whether we had been making or losing money in the intermediate time.

I was present at this interview about ten or fifteen minutes; maybe not so long.

I should think that the question of Mr. Day's going out
49 was settled in a few hours; two hours; maybe not so long as that, as far as I was cognizant of it.

Since that time Mr. Day has had money paid him, and he has written for a statement of his account. I can't tell when it was; it was after the October interview. I don't know how often he wrote. I think it was more than once.

I cannot say whether a statement was sent him or not; that is, I don't know.

So far as I know he did not come to Philadelphia again about this business until after our failure. It was arranged at this time in October that Dawes Furness was to go out.

Mr. James Furness told me that Dawes Furness was going out at the same time.

I cannot say whether I heard that Dawes Furness was going out before, at, or after this interview. Mr. James Furness did not tell me, that I recollect, why his son was going out.

I never knew the reason, nor do I know the reason now why he went out.

He, Dawes Furness, had been about the place of business for several years; I can't say how long. Upon going out of our firm he still came to the place of business, but not constantly; he continued to come to the office, but not so constantly after the first of the year. He assisted at the books from time to time.

I can't answer how he was compensated for his trouble; I supposed he was engaged by the firm, but I understood afterwards he was not. I do not know that he was compensated at all.

Mr. Day did no business for us in New York after October.

I was consulted about the making of the dissolution as of July 1.

Mr. Day said if he was to go out it must be as of the first of July.

After some talking between Mr. Furness and myself we agreed he should go out as of the first of July.

I do not know whether Dawes Furness or Mr. Day had
50 drawn anything on account of the profits between July 1 and October 1.

I do not know of their offering to refund anything drawn in the meantime.

I first heard the suggestion of the forming of the new firm of Furness, Ash & Co. after Mr. Brinley had gone out.

Mr. Brinley was to go out on October 1, 1877, as of the first of July, but not to be published until January 1, 1878. Mr. James T. Furness told me that

Mr. Furness told me before January 1, 1878, that we should have to have more capital, as we had had Mr. Day and Mr. Brinley to pay off, and we should want some $35,000. He told me he would put the capital in, and asked me if I could get $10,000; that we should cut the expenses down, and he thought we could do a very good business. Nothing else was said, except about the interest of the several partners. Mr. Furness and I were to divide the profits, my brother William to receive three-eighths of one per cent. commissions on the amount of sales.

On the first of the year the new firm was advertised and regularly commenced.

I cannot say what the proportion of business was from July 1, 1877, to January 1, 1878, as compared with the preceding six months, except that it was smaller.

It was smaller, I should say, than the last six months of 1876, but I do not know.

After January 1, 1878, their business was inside of $15,000; there was no business doing in February.

The amount was small, but our business does not commence until about March.

It has always been for years past smaller in the month of February. Some few of these goods sold then might have been brought over from Furness, Brinley & Co. The sales of Furness, Brinley & Co. have varied from $600,000 to over $2,000,000.

The large amounts were somewhere about 1866 or 1868.

Adjourned to January 9, 1879, at 3½ p. m.

51 JANUARY 9, 1879, at 3½ p. m.

Present: Joshua P. Ash, one of the defendants, Nathan H. Sharpless, Esq., for complainants, and Chapman Biddle, Esq.

Examination of JOSHUA P. ASH by Mr. SHARPLESS continued:

The witness says: I desire to correct my former testimony as follows: When Mr. Day went out, it was some time before the 1st of July that he wrote he desired to go to Europe, but I was anxious he should get my letter before he sailed.

I have had my attention called to the fact that I have several

times used the expression "I cannot tell." I mean and desire to be understood as meaning thereby that I do not know.

In answer to the question asked at the last meeting in regard to our annual sales, I find that in 1875 we sold $580,501.86; in 1876 they were $692,729.01, and in 1877 they were $393,853.70. In February we scarcely sell anything, January nothing, in the latter part of March heavily. The season runs in this way. The first part of the busy season is sometimes larger than the latter, and *vice versa*. It depends on the amount of goods imported, and when imported, and the state of trade.

We had two busy seasons in the year—spring and fall—the first one March, April, and May, the fall one September, October, and November. Some seasons the early part is good and the latter part not, depending altogether on circumstances.

I cannot tell when, exactly, I heard of Mr. Brinley's leaving the firm. It was in the early part of October, 1877. It was after Dawes, Farness and Mr. Day had gone out.

I then heard it from Mr. Brinley. He gave me no reason for leaving the firm.

Somewhere about ten years ago Mr. Brinley talked about
52 going out. When he proposed going out in October, 1877, Mr. Brinley and Mr. Farness were setting in the counting room. When I came in I found them there.

When I went in Mr. Brinley said to me he was going to withdraw from the firm. I asked him why he was going to do so. He said he had been a drone on us for the last ten years.

I made no remark to that, and being busy went out to the store. Some time after he said to me, I think it better that any arrangements made should be in black and white. I replied that any agreement that I made I was perfectly willing to sign.

He replied he knew so, he knew I would.

Some time after that, going into the counting-room, Mr. Brinley and Mr. James T. Furness were there. Mr. Brinley said there was that paper for me to sign, meaning the agreement guaranteeing him against loss, under date of October 22, 1877, and copied in the bill.

I read the paper and laid it down alongside of me on the desk. Mr. Bindley said, Are you not going to sign it? I replied to him that he knew I had nothing to do with the books or the counting-room arrangements, but if Mr. Furness said it was correct I would sign it. Mr. Furness said I could sign it. He, Mr. Brinley, then said, How about your brother William? When I said he knew my brother was only a partner on commission, and had no responsibility.

He said, "all right," or words to that effect.

That is all that took place that I myself know of Mr. Brinley's going out.

I do not know of my own knowledge that the books were balanced when Mr. Brinley went out.

I do not know how the sum of $25,000 was arrived at, which was agreed to be paid him.

I had nothing else upon which to found my signature to the agree-

ment of October 22, 1877, except the statement of Mr. Furness that it was all right.

53 After the paper of October 22 was signed, Mr. Brinley occasionally came to the store, but very seldom. He did not come so frequently as he had before.

Q. Other than during the period while he was out of the city, about how often did Mr. Brinley come to the store, and how long would he stay, prior to October 22, 1877?

A. He generally came every day; sometimes at 9 o'clock, and staying until 4 p. m. Sometimes he came later, leaving earlier. 9 o'clock, however, was the exception. After October 22, 1877, he came seldom, very seldom. He did not come every day; he came but seldom.

Q. As often as once a week?

A. I should say not, decidedly. He went into no business after October 22, 1877, that I ever knew of.

He did not leave the city, I think. I don't think that it was until after our failure that I discovered that we had agreed to give Mr. Brinley more for his interest in the firm of Furness, Brinley & Co. than it was worth.

I must correct that last answer by saying that I never did discover it. I never examined the books or the accounts.

I do not know what amount of paper Furness, Brinley & Co. had out on October 22, 1877.

I have no idea what was the indebtedness of Furness, Brinley & Co. on January 1, 1880.

I have not the slightest idea, nor of the amount of their indebtedness at that time.

Furness, Ash & Co. took Furness, Brinley & Co.'s old paper as it came due up to March 15, 1878, when Furness, Ash & Co. failed.

I do not know what assets Furness, Brinley & Co. turned over to Furness, Ash & Co.

I know nothing of their value.

Adjourned to January 16, 1879, at 3½ p. m.

54 JANUARY 16, 1879.

Mr. Sharpless not being able to be present on account of indisposition, the meeting was adjourned to January 23, 1879, at 3½ p. m.

JANUARY 23, 1879.

Present: Mr. Sharpless, Mr. Biddle.

The examination of JOSHUA P. ASH being continued by Mr. SHARPLESS:

He says: "Mr. Furness first said we needed more capital, as near as I can remember, in November, 1877. Prior to that time, the subject of raising means to pay off Mr. Brinley had never been mentioned that I recollect. As near as I can recollect, Mr. Furness said we should require about $35,000, and asked if I could raise $10,000. I told him I would if I could; that was all that was said."

Q. Please state all that occurred at any time thereafter between yourself and Mr. Furness in relation to this subject.

A. Mr. Furness stated that he should put in more capital, and expected to do so. On March 14, 1878, the day before the failure, I was busy preparing for a sale on the following day, running in and out of the store frequently, and between half past three and four o'clock in the afternoon I came into the store returning there. Mr. Furness was sitting in the store outside of the counting-room. He told me he could not raise the money; that he had been refused the money. I said nothing in reply, being in a hurry, and about to prepare for the sale next day, it being the only sale of importance that we had had, and had no further conversation with him that afternoon.

55 On the morning of the 15th I said to Mr. Furness when he came in, asking him if it was positive he could not get this money. He said it was.

I then asked him if he had anything to pay, and if he could pay, the sale as was our custom heretofore to do as usual, that is, cash on four to seven days; he replied that he would have to have three or four days over the usual time.

I replied if that were so, we were broke, and that I would not sell another dollar's worth of goods. He replied to me perhaps it is better; will you tell the consignors that have come on from New York to attend the sale what we have decided upon.

Previous to the 14th, some time probably late in the fall or early in the winter, when Mr. Furness mentioned putting in some money. He spoke also of getting a mortgage on his house in Pine street, and that he could get money from Mr. Newbold, as he had been in the habit of doing; that as we had reduced the expenses and the number of partners decreased, he thought we could do very well. That is all I recollect of.

I never knew that the paper of Furness, Ash & Co., have been offered for discount in the money market of Philadelphia, through Newbold & Sons, though I had heard of it. I heard of it from James T. Furness, I should say in February or March, 1878.

I neither know of any settlement of the books of Furness, Brinley & Co., or the taking of any stock by Furness, Ash & Co.

Of my own knowledge, I do not know, but I was told the books were settled after the failure for the first time since July 1st, 1877; we had no stock to take account of—that is, Furness, Brinley & Co. I may be wrong. Furness, Brinley & Co.'s books may have been balanced on January 1st, 1878.

I do not know of any paper of Furness, Ash & Co. being negotiated through any other house in Philadelphia than William H. Newbold's Sons & Co.

56 They and their predecessors had been our note brokers for a great many years.

James T. Furness actually carried on the business with these brokers.

It was his hand which signed all the papers which I have seen.

When Mr. Furness first told me of the negotiation of the paper

of Furness, Ash & Co., I think he told me some had already been negotiated. I don't think I knew any of the paper of Furness, Ash & Co. was out until Mr. Furness told me. I know nothing of Mr. Brinley having gone to Newbold Sons & Co. about the negotiation of this paper. I do not know what representations Mr. Furness made of the strength of Furness, Ash & Co. when this paper was negotiated.

I never made any representations on the subject.

I never heard him make any.

I never heard Mr. Brinley say a word on the subject.

The total indebtedness of Furness, Ash & Co. when they failed was about $78,000, of which about $40,000 was in their outstanding commercial paper, I think.

This indebtedness was created to pay for goods sold, and I was told by Mr. James Furness to take up Furness, Brinley & Co.'s paper, and I was also told by him that he had to pay Mr. Brinley $5,000 a month; whether it all came out of the negotiable paper I cannot tell.

Q. What business did Furness, Ash & Co. do, or did they expect to do, in the very short period of their existence, which in your estimation warranted them in assuming these large liabilities, and for what earthly consideration were they so assumed?

A. We did about $12,000 or $13,000, on which our profit was five per cent. We did. I did expect to do a profitable business. Up to the time we stopped the season was very young, as we do not generally sell very heavily until March. The spring of 1878 was
57 very backward, and I had no idea the house was insolvent. I had been with the house forty years. Mr. Furness had always managed it and had sole control of the finances.

As Mr. Brinley had retired from business I had no doubt, as he could afford to do so, that Mr. Furness was a rich man. I have no further answer to make to that question.

No effort that I know of was made to make any reclamation from Mr. Brinley after the failure of Furness, Brinley & Co. and Furness, Ash & Co. Mr. Day owed us a balance, and we wrote to him for that. Mr. Brinley had stated that he would pay the debts of Furness, Brinley & Co. This I heard from Mr. Henry Wharton and several other persons.

On reflection I am not sure that I heard it from Mr. Henry Wharton.

No cross-examination.

JOSHUA P. ASH.

Sworn and subscribed to before me.

SUSSEX D. DAVIS. *Examiner.*

58 JANUARY 30, 1879.

Present: Mr. Sharpless, Mr. Hart, Joshua P. Ash, and William H. Ash, two of the defendants.

WILLIAM H. ASH, one of the defendants, called on the part of the

complainants, being duly sworn, and examined by Mr. SHARPLESS, says:

I was a member on commission of the late firm of Furness, Brinley & Co.; also of Furness, Ash & Co., their successors.

I had been connected with Furness, Brinley & Co. seven years next July; that is, since July, 1872; I think I first heard of Mr. Day and Dawes Furness going out of the firm from my brother, Joshua P. Ash, the previous witness.

I should say that it was about the time that it happened.

I do not remember what he said to me about it, the mere fact of their going out had nothing special to strike me.

I understood from all the members of the house that Mr. Day had gone out because he had lost his usefulness.

I do not think I heard that from Mr. Brinley, nor of course Mr. Day.

I don't know why Dawes Furness went out.

I understood that Mr. Day retired at the request of the firm. I did not request him to go. I cannot tell who spoke to him on the subject.

I have always understood Mr. Day was a man of means, decidedly.

I cannot say whether Mr. Day was indebted to the firm or not when he went out; my business was entirely outside.

If he was indebted, I know of no effort on the part of the firm to collect from him.

I do not know why the dissolution, so far as it regards him, was antedated.

I was not consulted about it.

I did not consent; I was not asked to.

I saw Mr. Day about the place of Furness, Brinley & Co.
59 when this dissolution was agreed on. I had no consultation with him about it.

There was no conversation of his with other parties about it in my presence.

His usefulness had become impaired because he did not ship as many goods here to the house to be sold as we thought he ought to do.

I had noticed a diminution in the business he procured to be consigned to the house for, I suppose, the last seven years. That is, however, a guess.

During the same years our business increased and decreased, sometimes one, sometimes the other. We had another man drumming in New York who replaced the falling off of Mr. Day's consignments.

I know nothing of the withdrawals of members of the firm for personal expenses; my business was outside entirely.

I do not know whether in the last seven years the annual withdrawals of Mr. Day and Mr. Brinley had been increasing or decreasing. My own held about the same for the same period.

I heard first of Mr. Brinley going out from Mr. Furness or Mr. Joshua P. Ash.

I heard it about the same time of the dissolution.

I was told Mr. Brinley was going out; that is all I recollect.

I made no inquiry why Mr. Brinley, Mr. Day, or Dawes Furness went out.

I always supposed Mr. Brinley to be a man of capital.

I cannot tell you why Mr. Brinley's retirement was antedated as of July 1.

I was not consulted about it; I did not consent. I was not asked to.

I do not know of any means being taken by posting up the books to ascertain the interest of Mr. Brinley, Mr. Day, or Dawes Furness. I was employed entirely outside in the store.

I do not know who made the arrangement to pay Mr.
60 Brinley $25,000 on account of his interest.

I was not consulted about it; I did not consent; I was not consulted.

I first heard of the intention to form the firm of Furness, Ash & Co. from Joshua P. Ash. I heard of it very nearly at the time when the notice of partnership of Furness, Ash & Co. was published at the first of the year; that was the first I knew of it.

I did not know before that time that $25,000 was to be paid to Mr. Brinley on account of his interest in Furness, Brinley & Co.

I cannot say where I first heard Mr. Brinley was to receive $25,000 for his interest.

I cannot say whether I heard of it before or after January 1, 1878; now I reflect I think I heard it after the first of the year.

I was not consulted as to raising the money to pay him.

I do not know how the $20,000 which was paid him was raised; I never was consulted, nor did I consent to the discounting of Furness, Ash & Co.'s paper to pay him that $20,000; I do not know of any arrangement, nor did I ever hear of one, by which Furness, Ash & Co. agreed to pay Furness, Brinley & Co.'s debt.

I have heard that Furness, Ash & Co. owe about $74,000.

I cannot say how they contracted that amount of indebtedness in three months and a half of existence. If it was contracted to take up Furness, Brinley & Co.'s paper and to pay Mr. Brinley his $25,000, it was not done with my knowledge or consent.

I did not know that the paper of Furness, Ash & Co. was being offered for discount through William H. Newbold & Son until after the failure a long time.

I did not know of its being issued when it was issued, nor for what purpose it was issued.

Dawes Furness remained with us after he went out of the firm.

61 Dawes Furness was compensated, he told me, by a very small allowance or salary.

I noticed no difference as to his duties before and after the dissolution.

He was a single man, and lived at home with his father, James T. Furness.

Cross-examined by Mr. HART:

My duties were managing man outside and soliciting goods for the city of Philadelphia.

Those were my exclusive duties as connected with the firm.

Those things as to which Mr. Sharpless has asked me whether I was consulted by the firm or not when they were done, were not such things as it was contemplated by the firm or myself that I should be consulted about.

The matters enquired of by Mr. Sharpless did not come within the scope of my duties as a member of that firm.

Re-examined by Mr. SHARPLESS:

Q. What were the terms of the understanding between your co-partners and yourself as to what you were and what you were not to be consulted about?

A. There was no understanding about it that I know of.

W. H. ASH.

Sworn and subscribed to before me—

SUSSEX D. DAVIS,
Examiner.

Adjourned to February 6, 1879, at 3½ o'clock p. m.

62 FEBRUARY 6, 1879.

Present: James T. Furness, one of the defendants; Mr. Hart, Mr. Sharpless, and H. G. Ward, Esq., assignee in bankruptcy of Furness, Ash & Co.

JAMES T. FURNESS, one of the above defendants, being duly sworn and examined by Mr. SHARPLESS, on behalf of the complainants, says:

On the 1st of January, 1876, Edward L. Brinley, James T. Furness, Joshua P. Ash, Henry Day, William P. Ash, and Dawes E. Furness were the partners in Furness, Ash & Co.

The articles of copartnership were those of which Exhibits A and B, attached to the answer of myself and others, filed in this case, are copies. Matters continued on that basis until Mr. Day went out, which was in October, 1877, as of July 1, 1877, and Dawes E. Furness went out at the same time.

Mr. Day went to Europe before he went out. We found we did not need him, and gave him notice just before he sailed.

Dawes Furness then said he would go out, too, as the business was very poor.

Dawes Furness was my unmarried son, living in my house.

I have no copy of the notice we gave Mr. Day. I think he came on and we told him the circumstances.

I think Mr. Ash or I may have written him a letter telling him of the purposed change, and he came on. There may be a copy of the letter in the letter-book in the hands of Mr. Krumbhaar, our voluntary assignee.

Mr. Day did not come on until after he returned from Europe in the summer of 1877.

When he did come he remained two or three days, not more.

When he was in the counting-room Mr. Ash and myself were present at the agreement of dissolution. Mr. Day, when he
63 first came, was rather unwilling to go out. I cannot recall the conversation, excepting at first he did not want to go; but by-and-by he assented to the agreement.

The books of Furness, Brinley & Co. were not balanced at that time, nor was there a trial balance taken off.

No statement was made to Mr. Day about the business of the firm, except that no money was to be made with so many partners, and he did not make any inquiries; that is my recollection. I cannot recall any particular conversation.

I do not remember anything particular that occurred when he agreed to go out, except that he expressed a wish that the retirement from the firm by him should be as of the 1st of July. He gave no reason for that request that I remember.

Q. Who proposed that the dissolution should not be announced until January 1, 1878?

(Mr. Hart asks Mr. Sharpless to whose retirement or what dissolution he alludes. Mr. Sharpless says to the dissolution of Furness, Brinley & Co., and the retirement of Mr. Day and Dawes E. Furness.)

A. At that time no one proposed it should be made on the 1st of July. The discussion we had with Mr. Day was as to the 1st of July. No conversation was had as to January 1st; it was simply the retirement of Mr. Day and Dawes Furness on October 1.

Their retirement was announced about October 1, if not the very first of October, 1877.

When Dawes Furness went out, I think he first proposed his going out to me.

His annual share of the profits prior to that time was very small; for two years he may have had $2,000. The last year he did not have anything at all.

Mr. Henry Day, I suppose, was a man of means. I do not know where he got it. He made some money with us, but not enough to call him a capitalist. He had some means, however, besides. For three or four years previous to 1877 I cannot tell in a gene-
64 ral way even what Mr. Day's annual withdrawal of profits were. He drew $300 or $500 as he wanted it, and he had always a credit on the books.

His withdrawals in 1877 did not vary much from those of 1875 or 1876. We were always pretty easy with him, as long as there was enough to cover the drafts.

I don't think that Mr. Day ever demanded a statement of the affairs of Furness, Brinley & Co., either at the time of or after the dissolution.

Q. Suppose Mr. Day to have overdrawn his account as a partner

on October 1, 1877, when did the firm of Furness, Brinley & Co. first make claim upon him for reimbursement?

After the failure of Furness, Ash & Co., when they closed up matters, we made a statement to him showing that he would probably be indebted to us.

In the meantime, that is, from October 1, he had been drawing. We took an estimate as far as we could of the bad debts, losses, and expenses, and we gave him liberty to draw, but when we came to close up the result was, he was indebted to us.

I do not remember who took off the statement we worked on with Mr. Day, but I think it was myself and Dawes.

It was a rough sketch, not a regular account in dollars and cents. We gave it to Mr. Day; that was the last I saw of it.

After Mr. Day went home I do not think he returned to Philadelphia between that time and the time of the failure.

Dawes Furness is about twenty-seven years of age.

I think he first spoke of it to me when it was intimated to Mr Day that he should go out.

He did not propose to go into anything instead.

He had no knowledge of any other kind of business; he came into the store a lad from college. When he went out of Furness, Brinley & Co. he did not go into any other business; he could not get anything to do.

He made every effort that a man makes who is without employment. He saw friends and business men striving to get em-
65 ployment. I am not able to give any names. I cannot remember any person to whom he went that I can specify.

He remained with Furness, Brinley & Co. and Furness, Ash & Co. until the failure just as before, perhaps not so strictly to the office. He had no stated salary between October 1, 1877, and March 15, 1878, he received a small sum that was given to him, he performing the same duties as before.

I cannot, without reference to the books, tell what the amount of outstanding paper of Furness, Brinley & Co. was on October 1, 1877. On October 1, 1877, we kept accounts in the Commercial National Bank, Bank of North America, and the Central National Bank; that was all in Philadelphia; in New York we kept an account at the Merchants' National Bank. As the outstanding paper of Furness, Brinley & Co. came due after October 1 it was taken up by cash in bank and new discounts of our paper (Furness, Brinley & Co's).

I cannot tell, without reference to the books, what amount of paper Furness, Brinley & Co. got discounted at the banks here in Philadelphia between October 1, 1877, and January 1, 1878.

Dawes E. Furness kept the counting-house books of Furness, Brinley & Co. in 1876 and 1877.

Adjourned to February 13, 1879, at half past three o'clock p. m.

FEBRUARY 13, 1879.

Present: Mr. Sharpless, James T. Furness, and Mr. Hurst.

The examination of JAMES T. FURNESS being further continued by Mr. SHARPLESS, he says:

66 The compensation of Dawes Furness was nominal; no amount was stated. He said he had nothing to do; that he would remain with us, and we could give him what we saw fit.

I wish to say I gave Dawes' age incorrectly; it is thirty years, not twenty-eight.

It was not at the rate of $1,000 a year that was paid him.

Mr. Brinley first spoke to me about his going out of the firm on his return from Newport, that is, from September 15, 1877, to October 1 of that year.

Prior to that he had not spoken about going out to me.

I think the conversation was about Mr. Day's goining out. Mr. Brinley then said, "Then I'll go too."

I can't recall the conversation; we concluded we should go right along, as usual.

Mr. Brinley had to his credit something over, I think, $30,000, as near as I can remember without the books. We made a rough calculation, that is, I did, which he assented to, after deducting his probable share of bad debts and losses would give him some $20,000 to $25,000, and it was agreed that he should have that amount at different dates, leaving a sufficient amount to cover any future bad debts.

Thereupon I, with Joshua P. Ash, executed the paper dated Octobee 22, 1877, a copy of which appears in the bill.

I was only occupied an hour or so in making that calculation.

I should say, as nearly as I can tell, that two or three weeks elapsed between the time that Mr. Brinley first spoke to me and we executed the paper of October 22. At first we did not want to sign it, but after a little conversation concluded there was no reason why we should not.

It was Mr. Brinley who proposed the terms of the agreement. I cannot recollect what he said to induce us to sign it, except that he wished it signed.

67 At the time this paper of October 22 was made our books were not posted up as to the cash withdrawals of the partners. Some of those items were two or three years in arrears.

We took the probable amount that each partner had withdrawn from the memorandum in the drawer. I don't know whether Dawes or I, or both of us, examined the books.

I can't say how long our books had been so backward in the entries made therein. Business had been so poor that we had made no dividends, and we let the accounts slide on without posting up the drawings of the different partners. This had been done for a year or two.

Some accounts of some partners were always posted up; for instance, the drawings of Mr. Day were always posted right in. Mr. Brinley's, Mr. Ash's, and my own accounts were left in the drawer on a memorandum until we came to a final close.

Q. What reason, if any, did Mr. Edward L. Brinley give, either

at the time of his first mentioning the subject, or thereafter, for so summarily severing a business connection with you, which appears to have lasted about thirty years?

A. He gave bad debts, losses, non-paying business, and that he was a perfect drone in the business; that he did not do anything at all. Once before he proposed to go out, and the partners in Philadelphia made no objection; but Mr. Day persuaded him to remain, thinking there would be an improvement in business. That was, I should say, four or five years before he went out. I have no idea what amount of cash we had in the bank on October 22, 1877.

Q. Can you give me any idea, or did you concern yourself about it at the time, as to how the amount of your cash in bank and your bills receivable on October 22, 1877, compared with the amount required to pay Mr. Brinley and the then outstanding bills, payable of Furness, Brinley & Co., and the current expenses of their business in the meantime?

A. I can't give you any idea, excepting that we had, or thought we had, or would have, enough to pay these things as they
68 came due. Nothing was said between Mr. Brinley and myself as to how the $25,000 to be paid him was to be raised; he apparently took no interest in the business.

I suspect he had counsel at the time; I don't know though. It rather annoyed me that he thought fit to consult counsel; he had our word. I acted on the suspicion he had counsel. I never supposed Mr. Brinley drew that paper up.

Mr. Ash and I had no conversation about Mr. Brinley going out except that we assented to it.

I do not remember anything between Mr. Ash and myself being said as to how the money was to be raised to pay Mr. Brinley.

We had just made one dissolution, that of Mr. Day and Dawes Furness, and we did not wish immediately to announce another, was the reason why we had the dissolution with Mr. Brinley to take effect on July 1, 1877, but not to be announced until January 1, 1878. It was Mr. Brinley requested this. He requested it as a matter of form that he should be allowed to go out as of July 1.

Between July 1, 1877, and October of the same year we had paid no dividends; we had made no money.

Until January 1, 1878, we conducted the business of Furness, Brinley & Co. under that name just as before the dissolution.

On January 1, 1878, we announced the dissolution of Furness, Brinley & Co., and the formation of Furness, Ash & Co.

On October 22, 1877, when Mr. Brinley went out, he was understood in the firm to be a man of means.

Furness, Ash & Co. stopped payment on March 15, 1878, about.

Between October 22, 1877, and March 15, 1878, we had paid Mr. Brinley $20,000 of the $25,000.

Adjourned to February 20, 1879, at 12 m.

69 FEBRUARY 20, 1879.

Present: Mr. Sharpless, Mr. Hart, Mr. Ward, assignee in bankruptcy.

The examination of JAMES T. FURNESS continued.

By Mr. SHARPLESS:

He says:

I do not think Furness, Ash & Co. ever paid any notes of their own. The amount of their indebtedness at the time of their failure was, I think, something over $50,000, but I cannot tell without reference. The indebtedness of Furness, Ash & Co. was nearly all for borrowed money or notes discounted; there were some few debts for sales.

The way we borrowed money was by having our notes negotiated at low rates; we never went out to borrow money.

Newbold, Son & Co. were the brokers who negotiated our notes for us. They had been our brokers for that purpose for many years.

I transacted the business of the firm of Furness, Ash & Co. with these brokers. It belonged to my department.

The money thus raised was used to pay sales and the indebtedness of Furness, Brinley & Co.

A large portion of it was used in taking up the outstanding obligations of Furness, Brinley & Co., and for indebtedness which had been contracted while Mr. Brinley was a member of the firm.

Nothing was said, that I can remember, between Mr. Brinley and myself as to how the money to pay him the $25,000 was to be raised when he went out. We anticipated no trouble at that time.

We never talked about the financial part of the business. He did not know anything about it at all.

Mr. Brinley made no enquiries of me as to how the money was to be raised, nor did any one on his behalf.

70 Q. What assets had Furness, Brinley & Co. at the time Mr. Brinley went out, with which to pay the indebtedness of that firm, and the sum of $25,000 to Mr. Brinley, of which he had any knowledge, or reason to suppose they existed?

A. Cash in bank. I can't give the amount without reference to the books, but several thousand dollars, bills receivable, and the supposed capital of all the partners, was sufficient. Money was easily obtained.

On October 1 the bills receivable must have been $20,000, but I can't say for certain without reference to the books. Their bills payable on that date I should not say amounted to $50,000 or $60,000, but I can't tell without reference to the books. No estimate was made of the capital of the firm when Mr. Brinley went out.

Q. As a matter of fact, as you see it now, the firm of Furness, Brinley & Co. was insolvent when Mr. Brinley went out?

A. Yes, sir.

Mr. Brinley got no notes for the $25,000. We commenced to pay him $5,000 on the 1st of November, and paid him $5,000 on the several dates set forth in our answer filed.

The money raised by the discount of the notes of Furness, Ash & Co. was used to pay Mr. Brinley, as well as other indebtedness.

All the bank accounts of Furness, Brinley & Co. were transferred to Furness, Ash & Co. We went right on as if it was the same con-

cern, excepting the expenses were not charged to Mr. Brinley. There were no profits.

Q. After Mr. Brinley went out, what occurred that was not anticipated at that time, which produced or contributed to the failure of either Furness, Brinley & Co. or Furness, Ash & Co.?

A. Bad debts, loss of business, and heavy expenses.

I can give you no idea of the bad debts, as we did not charge them up until after this time; they had been running two or three years. I do not think the expenses were any heavier after Mr. Brinley went out.

71 The witness says: In addition to cash in bank, bills receivable, and the supposed capital of the partners, we had a large contingent fund which was swept away. I mean this as an explanation of my prior answer as to what we had to pay Mr. Brinley with.

The contingent fund arose from the profits made every six months. We put it against any bad debts which might happen. It was swept away by bad debts.

In the old times, when we made money, that contingent fund was really a source of profit to us, as we every once in a while divided a portion of it.

I can't recollect any debt which we found to be bad after Mr. Brinley went out that we did not know of before. I think there were some, but I can't recall them. The unexpected loss of business to which I refer was the dying out of all business of Furness, Brinley & Co. and Furness, Ash & Co. This had been going on for three years to five years after. Since this panic everything has been going wrong with the auction business.

Q. Do you recollect saying anything to Mr. Joshua P. Ash about issuing the paper of Furness, Ash & Co. to pay the debts of Furness, Brinley & Co., and to raise money to pay Mr. Brinley; I mean before it was issued?

A. I may have done so or I may not; I do not remember; I may have done so in a general way; the brokers offered us money constantly.

Q. At the time when the paper of Furness, Ash & Co. was first given to Newbold, Son & Co. to introduce into the money market of Philadelphia, or thereafter, what inquiries, if any, did they make, or what representations, if any, did you make, as to the strength of the new firm?

A. No statements or enquiries were made on either side, then or thereafter, to my recollection.

Q. Then do I understand you that if Newbold, Son & Co. did make any statement relative to that subject on negotiating said paper their information was derived from other than yourself?

72 A. Yes, sir; I desire to be so understood.

Q. Did you, at any time after Mr. Brinley left the firm, meet him at the office of Newbold, Son & Co.?

A. No, sir.

We heard indirectly that Mr. Brinley had been down there to negotiate some paper, but when or how we heard it I do not remember.

I never heard or knew of any statements of Mr. Brinley's with regard to the paper of Furness, Ash & Co.

Q. About how long before Furness, Ash & Co. failed did you know they would have to stop?

A. Not until the 15th of March did we think we would or should suspend.

Q. Had you not feared it before that time?

A. No, sir.

Q. What means had Furness, Ash & Co. on hand as early as February 1, 1878, or thereafter, with which to pay this large amount of paper, both of Furness, Brinley & Co. and Furness, Ash & Co., which was coming due, and from what source other than new discounts had they any reasonable anticipation of raising money for the purpose?

A. All of the assets of Furness, Brinley & Co., cash, notes, and a strong hope or hopes that business would improve.

Adjourned to March 13, 1879, at 12 o'clock m.

MARCH 13, 1879.

Present: James T. Furness, one of the defendants; Mr. Sharpless, Mr. Hart.

The examination of JAMES T. FURNESS being further continued by Mr. SHARPLESS, he says:

Q. Other than the omission of the items which appeared on
73 the memoranda kept in the cash drawer of the withdrawals by the various partners of Furness, Brinley & Co., did the books of Furness, Brinley & Co., during their existence, and the books of Furness, Ash & Co. truly represent from day to day all the transactions of both of those firms?

A. I think so, and these items of cash withdrawal were all truly charged up after the failure.

Q. On further reflection are you able to give us any estimate, approximate or otherwise, of the amount of the debts of Furness, Brinley & Co. which were paid out of assets, by which I mean discounts of the paper of Furness, Ash & Co.?

A. I cannot, sir.

Q. Does the bills payable book of Furness, Brinley & Co. accurately show all the paper of that firm outstanding on July 1, 1877, or which was issued thereafter?

A. The bills payable account in the ledgers of Furness, Brinley & Co. and Furness, Ash & Co. show accurately all notes issued by either of those firms.

Q. What other obligations for the payment of money had you?

A. There may have been some due bills for moneys deposited with us on interest; they would appear in the cash-book if not of long standing; besides these we may have owed some unpaid sales; they were open accounts.

Q. Were Furness, Brinley & Co. debited on the books of Furness, Ash & Co. with the money paid on their account?

A. No, sir.

Q. Why not?

A. It was a continuation of the house.

Q. That is Furness, Ash & Co. was a continuation of Furness, Brinley & Co.?

A. Well, it was not a continuation, but they assumed to pay everything.

Adjourned to March 13, 1879, at 12 o'clock m.

74 MARCH 13, 1879.

None of the parties being present, the meeting was adjourned to March 20, 1879, at 12 o'clock m.

Adjourned to March 27, 1879, at 12 o'clock m.

MARCH 27, 1879.

Present: Mr. Sharpless, Mr. Dickson, Richard S. Brock, a member of the firm of John S. Newbold, Son & Co., and James T. Furness, one of the defendants.

Cross-examination of JAMES T. FURNESS by Mr. DICKSON:

He says: I should think Mr. Brinley was about seventy years old.

Q. What part did he take in the business of the house?

A. For the last five or six years he had scarcely anything to do with the concern, except to sell once in a while. He generally went to Newport in June, and staid until October. When here he was at the office from about half past ten to three, as nearly as I can remember.

Q. Am I right in understanding that Mr. Day retired from the house at the request of yourself or some of your partners?

A. Not especially at my request; it was the general wish of all of us that he should retire.

Q. Do you remember his proposing to buy Mr. Ash out—that is, having Mr. Ash go out in his place?

A. I do not remember the exact conversation, but to my best recollection he did propose something of the kind.

75 Q. That is, he wished, did he not, to remain in the business, and Mr. Ash go out?

A. I can't tell what his idea was; his proposition was something like that.

Q. When did you endorse some of the notes of Furness, Ash & Co. with your individual name, and why?

A. I cannot tell when, but it was the custom we had for years of drawing them in that way.

It was simply according to what had been the usual course of our business.

JAMES T. FURNESS.

Sworn and subscribed to before me—

SUSSEX D. DAVIS, *Examiner.*

Mr. Hart reserves the right to cross-examine at any future time, if upon examination of the testimony he sees any reason therefor.

Adjourned to April 3, 1879, at 12 o'clock m.

APRIL 3, 1879.

Present: Mr. Hart, Gillies Dallet, president of the Penn National Bank.

Mr. Sharpless not being present, being engaged in court of common pleas No. 2, the meeting was adjourned to April 10, 1879, at — o'clock — m.

76 MARCH 20, 1879.

Present: Mr. Sharpless, James T. Furness, one of the defendants, and Dawes E. Furness, also one of the defendants.

DAWES E. FURNESS, one of the above-named defendants, being called on the part of the complainants, and duly sworn, examined by Mr. SHARPLESS, says:

I am one of the members of the late firm of Furness, Brinley & Co. I became a member of the firm on July 1, 1872. I continued such down to September 30, 1877.

I was nearly twenty-five years old when I became a member of the firm.

I went there as a clerk in September, 1868, when I was of age.

My percentage of profits was three-eighths of one per cent., less the bad debts, and then three-eighths of one per cent. on such bad debts, if collected. My profits the first year were about $3,000, and the last year between $1,200 and $1,400.

It had been steadily going down from year to year in the mean time. My department was in the counting-room, in charge of some of the books, except the last year, when I was in New York, for the larger part of the time, soliciting consignments. In a general way, my duty was to keep the counting-house book, under the direction of my father. After I went out of the firm of Furness, Brinley & Co. I remained with them until January 1, 1878, and afterwards with Furness, Ash & Co. until they failed, but not as a regular clerk. My being there was optional; some days I was there, some days I was not.

After September 30, 1879, I did not go over to New York at all. I did whatever writing was at hand in the counting-room, for the convenience of others, and I did not have anything to do with the signing of checks; otherwise my duties were as before.

77 After September 30, 1877, I received $50 a month as compensation. That arrangement was made with my father.

I do not remember speaking about it to any other member of the firm. After September 30, 1877, my father and myself kept the ledger of these two firms.

Q. Did the books of Furness, Brinley & Co. and the books of Furness, Ash & Co., as kept by you from day to day, accurately show all the business transactions of each of those firms down to the time of the failure of Furness, Ash & Co.?

A. To the best of my knowledge, the books of Furness, Brinley & Co., and the books of Furness, Ash & Co., did, down to the time of their failure, accurately show their daily transactions, so far as I had anything to do with the keeping of them, or know.

From July 1, 1872, down to October 1, 1877, when I went out, there had been a visible decline in the business from year to year.

Q. And during that period, from July 1, 1872, to October 1, 1877, had or had not the business of Furness, Brinley & Co. been carried on to a large extent upon money procured by the discount of the commercial paper of that firm?

A. I should say not to a large extent.

Q. To what extent?

A. I think probably in the first two years there was no paper out of that firm. In the last two years I think there was not more out at any one time than $20,000, maybe not so much as that, except towards the latter end, when it may have been $30,000. I mean for the last five or six months prior to October 1, 1877.

Frequent complaints were made by the members of the firm that business was dull. They hoped it would be better as time went on, or next season.

Q. Were or were not Mr. Brinley and Mr. Day considered as the strongest capitalists in the firm of Furness, Brinley & Co.?

78 A. To the best of my knowledge, yes. I do not think I heard of Mr. Brinley going out until towards the end of December, 1877.

As far as I saw, previous to that, he had been about there just as he had previously to the 22d of October, 1877.

DAWES E. FURNESS.

Sworn and subscribed to before me—

SUSSEX D. DAVIS, *Examiner.*

APRIL 10, 1879.

Present: Mr. Sharpless, William Gummere, president of the National Bank of the Northern Liberties, and Gillies Dallett, president of the Penn National Bank, two of the complainants.

WILLIAM GUMMERE, a witness called on the part of the complainants, be duly affirmed and examined by Mr. SHARPLESS, says:

I am president of the National Bank of the Northern Liberties. I have been president of it nearly five years.

Our bank was a creditor of Furness, Ash & Co. We hold two of their notes. The two notes together amount to about $5,300.

We have them yet.

They were dated in the fore part of February, 1878, and had three or four months to run.

We got the notes from Newbold, Son & Co., bill brokers.

One of the firm, Mr. Smith, brought them up to our bank for us to discount them.

Q. Please state as near as you can what, if anything, was said at that time by Mr. Smith about this paper as an inducement for you to take it.

79 A. When he gave the paper to me I mentioned that Mr. Brinley had gone out of the firm. He said yes, but that Mr. Brinley, for a good many years, had paid no attention to the busi-

ness, and that a large part of his time he spent in Newport. Mr. Smith said that they, that is, their firm, knew what Mr. Brinley had in the firm, which was, I think he said, about $20,000, had been paid to him, and that they considered the firm perfectly good as it stood. We discounted the paper.

That is all I heard about the paper then or at any other time from them, that is, Newbold, Son & Co.

They said nothing about anything they had learned from Mr. Brinley, as I remember.

I don't remember where they said they had learned of the $20,000 paid Mr. Brinley from.

I think, but I am not positive, that Mr. Smith said they were investing some of this $20,000 for Brinley, but I do not feel certain of this.

W. GUMMERE.

Sworn and subscribed to before me—

SUSSEX D. DAVIS, *Examiner.*

Adjourned to April 17, 1879, at 12 o'clock m.

APRIL 17, 1879.

Present: Mr. Hart.

The other parties not being present, adjourned to April 24, 1879, at 12 o'clock m.

80 APRIL 24, 1879.

Present: Mr. Sharpless.

GILLIES DALLETT, a witness called on the part of the complainants, being duly sworn and examined by Mr. SHARPLESS, says:

I have been president of the Penn National Bank for more than five years.

At the time of the failure of Furness, Ash & Co. we held one note of Furness, Brinley & Co., and six notes of Furness, Ash & Co., all of which was protested. We have received the money on Furness, Brinley & Co.'s note.

The Furness, Ash & Co. notes amount, as nearly as I remember, first note to $12,800 about.

It is all still unpaid.

The paper of Furness, Ash & Co. was made as follows: Two notes were made in January, 1878; we took them about January 26; and four notes, amounting to about $5,800, dated in February, were taken by us about February 27, I think on that day.

We got all the paper from Messrs. Newbold, Son & Co., note brokers. We knew them as the note brokers of Furness, Ash & Co. and Furness, Brinley & Co. I don't think I ever saw their paper with any other broker.

I don't remember any representations which were made to me when we took the first lot of Furness, Ash & Co.'s paper.

I know both lots of paper were approved by the board of directors of the bank at a regular meeting before we took it.

I remember a conversation immediately before—a day before we took the lot of paper—in the office of Messrs. Newbold, Son & Co.

The conversation was participated in by several gentlemen connected with their firm, and some one of them stated that Mr. Brinley had given to Mr. Newbold, as his, Brinley's reason for re-
81 tiring from the firm, that he did not like to participate in the profits when he gave no services and his capital not needed.

There was a good deal of conversation about this paper, but I remember no other statements which were made to me.

I think I reported this to some of the directors, but I am not certain. I know it had an effect on my mind, and I advocated the paper.

GILLIES DALLETT.

Sworn and subscribed to before me—

SUSSEX D. DAVIS, *Examiner.*

Adjourned to April 24, 1879, at 12 o'clock m.

APRIL 24, 1879.

Present: Mr. Sharpless, who was not prepared to go on.

Adjourned to May 1, 1879.

MAY 1, 1879.

Present: Mr. Sharpless and Mr. Hart.

EDWIN P. GRAHAM, a witness called on the part of the complainants, and being duly sworn and examined by Mr. SHARPLESS, says:

I am the cashier of the Commercial National Bank of this city.

Furness, Brinley & Co., and afterwards Furness, Ash & Co., kept their accounts with that bank.

At one time Furness, Brinley & Co. kept a very good account there; we considered it a very good account.

The account of Furness, Ash & Co. was not so good as the account of Furness, Brinley & Co.; that is my impression.

82 In January, 1878, Furness, Ash & Co. borrowed $16,000 of our bank, and gave the following due bills:

"Borrowed and received, January 17, 1878, of Commercial National Bank, six thousand dollars, returnable on demand either in cash or bills receivable with our endorsement, with interest.

$6,000. FURNESS, ASH & CO.

JANUARY 17, 1878.

Borrowed and received of Commercial Bank five thousand dollars, returnable on demand, with interest, either in cash or bills receivable, with our endorsement.

$5,000. FURNESS, ASH & CO.

PHILADELPHIA, *January* 22, 1878.

Borrowed and received of Commercial Bank of Pennsylvania five thousand dollars, returnable to the Commercial Bank about the middle of February, 1878, with interest.

FURNESS, ASH & CO.

These are all still unpaid, except a balance of $1,851.85, which was a deposit account, and which was appropriated by us on account of the same due bills.

This transaction was not made with me but with Mr. Palmer, the then cashier, since deceased.

We never got the bills receivable or any of them mentioned in these due bills.

I think there was no move made on the part of Furness, Ash & Co. to furnish us with the bills receivable referred to in the due bills.

I can't say which member of the firm got the money from us.

I don't know of my own knowledge, but I have heard at the bank, that the bills receivable were to be furnished for this paper in a short time.

83 Q. What reason, if any, had the bank to think that they were possessed of securities with which to meet said due bills?

A. They kept a box or covered basket made of bamboo in our vaults, which they sent their man for and obtained, and then returned.

This box was sent for frequently by Furness, Ash & Co., and then returned. Those about the bank supposed it contained valuable securities. It was finally taken away and never brought back. Results show there was nothing in it unless they disposed of it.

It was taken away after their failure.

No cross-examination.

E. V. GRAHAM.

Sworn and subscribed to before me—

SUSSEX D. DAVIS, *Examiner.*

MAY 7, 1879.

Present: Nathan H. Sharpless, Esq., for complainants.

WILLIAM ECKSTEIN, a witness called on the part of the complainants, being duly sworn and examined by Mr. SHARPLESS, says:

I was a creditor of the late firm of Furness, Brinley & Co.

I was a creditor of Furness, Brinley & Co. to the amount of $1,600. I was unaware that a new firm, that of Furness, Ash & Co., had been formed. I lent them $200 more; that is, I deposited that amount, $1,800. I first held a due bill of Furness, Brinley & Co. for $1,600, signed Furness, Brinley & Co. I then lent them $200, and received a due bill signed Furness, Ash & Co. The due bill of Furness, Ash & Co. was dated January 15, 1868, the day I gave them the $200. This is the due bill. It reads: "Phil., Jan-

84 uary 15th, 1878. Received of Mr. Wm. Eckstein, eighteen hundred dollars, payable on demand, with interest, subject to two or three days' notice. $1,800. Signed Furness, Ash & Co."

When they gave me that due bill I asked, what is this; is there a change in the firm? Since when? This conversation was with James T. Furness. Mr. Brinley was not there. He said the change

was made since the first of the year. He said Mr. Brinley went out because he was getting old, and he knew he was not earning anything. That was about the substance of what he said. I did not know of the change in the firm until I went there on that day. They, that is, Mr. Furness, took the old due bill of Furness, Brinley & Co., and kept it.

I did not know that there had been a change in the firm until I gave up the old due bill and had the new one in my hand. After that I never saw my old due bill again. I do not know what became of the old due bill. If they destroyed it they did not do so in my presence.

WM. ECKSTEIN.

Sworn and subscribed to before me—

SUSSEX D. DAVIS,
Examiner.

GEORGE D. KRUMBHAAR, a witness called on the part of the complainants, being duly sworn and examined by Mr. SHARPLESS, says:

I am the voluntary assignee of Furness, Ash & Co., as a firm and individually, and also of Dawes E. Furness. The assignment is dated.

It was duly recorded, and an inventory filed. I accepted the trust, and am acting under it. I am acting under the supervision and direction of the assignee in bankruptcy, H. G. Ward, Esq.

85 As you request, I have produced the books of Furness, Ash & Co.; they are the books, also, of Furness, Brinley & Co. Furness, Ash & Co. did not open new books. They continued the old books of Furness, Brinley & Co.

Witness produces—

Cash-book No. 25.
List of bills, No. 14.
" " receivable.
Bills receivable.
Ledger.
Private ledger.
Sales book.
Five check-books.
Note-book.
Book "Notes given by purchasers," record.
Letter-book.
Eight balance books.
One balance book, 1873.
Commercial National Bank book.
Books marked by examiner S. D. D., Exhibit A to Y, inclusive, May 7, 1879.

These books were all the books they delivered to me in relation to their current business, except an additional private memorandum, produced and marked S. D. D., Exhibit Z, May 7, 1879.

I got these books myself from the safe of Furness, Ash & Co.

I got all that was there relating to their current business, as represented to me. I never had any reason to doubt I got them all.

They also surrendered to me quite a large number of books, which they told me were the old books of Furness, Brinley & Co.

Q. At the time of the failure of Furness, Ash & Co., about
86 March 15, 1878, the outstanding liabilities of Furness, Brinley & Co. was about $39,000, mostly made up of their outstanding bills payable, and of Furness, Ash & Co. about $74,000, as stated in the complainants' bill.

My information of their liabilities, then and since, is according to the liabilities stated in the bill. The assets of Furness, Ash & Co. which came into my hands consisted of the fixtures and furniture of the store, some bills receivable, and two life policies on the lives of debtors.

I have received from Furness, Ash & Co.'s partnership assets, which included whatever was received from accounts due Furness, Brinley & Co., to whom Furness, Ash & Co. succeeded, $7,907.27, gross amount. The net amount is $5,271.

Of this gross amount, $7,907.27, about $3,800 was cash in bank, about $680 from Furness, Brinley & Co.

What I received from Furness, Ash & Co. was appraised at $——, as appears by the inventory and appraisement on file.

I received from them, individually, the house of James T. Furness, on Pine street, above Broad, in this city, which has just been sold for the net proceeds of about $13,000, a half undivided interest in some vacant lots in St. Louis, which I am negotiating for a sale of the half for $3,500. Joshua P. Ash had a house on Spruce street, above Seventh, which sold for about $1,600 over and above all incumbrances, and also some lots corner Broad street and Government avenue, an undivided interest with W. H. Ash. I have realized nothing from them. They will be of value some day. The whole appears in the inventory on file. This is about all of any value which I have seen in the estate.

There was a farm with a mortgage on, in the country, which J. P. Ash had, but it is of little value. Dawes E. Furness had a lot in
Chicago. No money has been received from the life insur-
87 ance policies. The balance of cash, which was in the Commercial Bank, of $1,851.53, I did not get. They held it on account of the $16,000 owed them.

GEO. D. KRUMBHAAR.

Sworn and subscribed to before me.

SUSSEX D. DAVIS, *Examiner.*

MAY 15, 1879.

Present: Mr. Sharpless.

LEMUEL C. SIMON, a witness called on behalf of the complainants, being duly sworn, and examined by Mr. SHARPLESS, says:

I am assistant cashier of the National Bank of the Northern Liberties.

I am familiar with the keeping of books of account, and have been for the past thirty years.

I kept mercantile books for about two years.

I have examined the books of Furness, Brinley & Co. and Furness, Ash & Co., at the request of plaintiff's counsel, since July 1, 1877.

Q. Do they or not appear to show a fair record of their business transactions since that time?

A. Whilst I do not consider them a properly kept set of books, they profess to show a fair record if all their business transactions.

At the commencement of the firm of Furness, Ash & Co. new books were not opened; the accounts were continued in the old books of Furness, Brinley & Co. You could not tell by the books where one firm ended and the other commenced.

Q. Can you say from the books as to whether or not the firm of Furness, Brinley & Co. were solvent on July 1, 1877?

88 A. They were totally insolvent. Exhibit P, being a statement of theirs under date of July 12, 1877, shows it conclusively. Cash on hand is said to be $136,737.43, which is necessary to balance their books, but the memoranda of cash on hand shows that $105,430.63 were simply memoranda of the individual members of the firm. The amount of cash really on hand was $13,828.51. The balance consisted of other memoranda, the nature of which I do not know.

Q. Have you taken off, at my request, a statement of the indebtedness of Furness, Brinley & Co. and Furness, Ash & Co., for money borrowed from July 1, 1877, to March 1, 1878, and again upon March 16, 1878, as appears from said books?

A. I have, and present it as follows:

July 1, 1877.	Due N. S. & Co.		$12,000 00
	" Comm'l B'k		16,500 00
	" Central Bank		7,000 00
	" R. H. Small		10,000 00
	Bills payable		24,264 91
			$69,764 91
Aug. 1, 1877.	Due N. S. & Co.		$12,000 00
	" Comm'l B'k		10,000 00
	" Central Bank		7,000 00
	" R. H. Small		10,000 00
	Bills payable		27,530 65
			$66,530 65
Sept. 1, 1877.	Due N. S. & Co.		$3,500 00
	" Comm'l B'k		8,000 00
	" Central Bank		7,000 00
	" R. H. Small		10,000 00
	Bills payable		30,187 55
			$58,687 55

89	Oct. 1, 1877.	Due N. S. & Co	$4,000 00
		" Comm'l B'k	13,500 00
		" R. H. Small	15,000 00
		Bills payable	46,047 03
			$78,547 03
	Nov. 1, 1877.	Due N. S. & Co.	$7,500 00
		" Comm'l B'k	13,500 00
		" R. H. Small	15,000 00
		Bills payable	45,235 77
			$81,235 77
	Dec. 1, 1877.	Due N. S. & Co.	$8,500 00
		" Comm'l B'k	18,000 00
		" R. H. Small	20,000 00
		Bills payable	32,673 22
			$79,173 22
	Jan. 1, 1878.	Due N. S. & Co.	$4,000 00
		" Comm'l B'k	8,000 00
		" R. H. Small	20,000 00
		Bills payable	31,424 97
			$63,424 97
	Feb. 1, 1878.	Due N. S. & Co.	$10,000 00
		" Comm'l B'k	16,000 00
		" Small	20,000 00
		Bills payable	36,807 59
			$82,807 59
	Mar. 1, 1878.	Due N. S. & Co.	
		" Com'l B'k	$16,000 00
		" Small	20,000 00
		Bills payable	49,052 59
			$85,052 59
90	Mar. 16, 1878.	Due N. S. & Co.	$18,000 00
		" Com'l B'k	16,000 00
		" Small	20,000 00
		Bills payable	44,164 79
			$98,164 79

I have also made an itemized account of their "bills payable" account from July 1, 1870, to the time of their failure, March 16, 1878. Here it is.

Paper produced and marked S. D. D., Exhibit No. 1.

The firm of Furness, Brinley & Co., now Furness, Ash & Co., did not keep any journal, or at least there is none among the books. The entries appear to have been made at once in the ledgers, which have not been balanced.

James T. Furness' account on the ledger stood on January 5, 1859, credited for $33,000; on January 1, 1867, credited for $50,000; on August, 1872, credit $19,000; on February, 1875, credited $19,000; on July, 1877, debtor $41,000; on April 4, 1878, debtor $52,000.

In March, 1878, his account was charged with $67,647.67 memoranda and cash.

E. L. Brinley's account stood January 5, 1859, credit $63,629.18; on January 1, 1867, credit $65,785.06; in August, 1872, credit $75,133.64; on February, 1875, credit $30,733.64; July 1, 1877, credit $17,037.87; April 4, 1878, credit $2,180.29.

In March, 1878, his account is charged with $2,367.20.

J. P. Ash's account, January 5, 1859, is credited with $25,170.79; on January 1, 1867, with $51,806.22; on August, 1872, $20,894.03. July, 1877, it is credited with $25,894.03. On April 4, 1878, it is debited with $21,592.97. In March, 1878, his account was charged with memoranda $43,528.30.

The memoranda, in statement marked S. D. D., Exhibit "P," composing cash in the statement July 12, 1877, were:
91 Furness, $49,823.92; E. L. B., $16,843.75; D. E. F., $260; J. P. Ash, $38,502.96.

From these entries this much is perfectly clear, that unless the several amounts charged to the several partners had been paid in by them, Mr. Brinley's share in the concern was considerably less than nothing.

The books show that these amounts were not paid in or anything material on account thereof, except one payment of $5,000 by James T. Furness, as appears on his account February 8, 1878.

The only business which Furness, Ash & Co. appear to have done from January 1, 1878, to the close of their business on March 16, 1878, was to sell about $12,800 worth of goods, on which the commission and guarantee or their profits appear to have been $892, and their expenses about $6,400.

The other business was the negotiating of paper of Furness, Ash & Co., and the taking up of paper of Furness, Brinley & Co.

The private ledger is very irregularly kept; the accounts of the several partners seem to have been entered and then cancelled and then other entries made, and from July 1, 1877, dates are very considerably jumbled.

In the cash-book, after January 1, 1878, there are twenty pages of credits in the cash-book, and about seventy pages subsequent to July 1, 1877. They appear to be credits to a very large amount for small sums. I mean by this that they are spread over that many pages.

Adjourned to May 22, 1879, at 12 o'clock m.

MAY 22, 1879.

None of the parties appearing, the meeting was adjourned to May 29, 1879, at 12 o'clock m.

92 MAY 29, 1879.

None of the parties appearing, the meeting was adjourned to June 5, 1879, at 12 o'clock m.

JUNE 5, 1879.

Present: Mr. Sharpless, for complainants.

The examination of LEMUEL C. SIMON being continued by Mr SHARPLESS, he says:

Q. What, if anything, appears upon the books to have been the loss to Furness, Ash & Co. upon the business which they did; that is, what was charged off to profit and loss?

A. I can't tell; they did not keep a proper profit and loss account. There appears to be no entries on the books of any losses to Furness, Ash & Co.

The books appear to have been balanced partly on March 16, 1878; that is, the books are professedly balanced on that day.

Q. Can you tell me how the amount of bills payable issued by Furness, Brinley & Co. in the first three months of the year 1867 compared with the amount issued by Furness, Ash & Co. between January 1, 1878, and their failure, March 16, 1878?

A. Bills payable account in private ledger shows that for the first three months of 1877 they issued $24,280.77 of bills payable, and that from January 1, 1878, to March 16, 1878, they issued $35,022.75 of bills payable. This does not include the amounts received as loans on due bills from Commercial National Bank and Newbold, Son & Co.

The books do not show any loans from the Commercial National Bank or Newbold, Son & Co. during the first three months of 1877; that is, the books I have here. The cash-book for that period does not appear to have been produced.

93 Q. In addition to the bills payable issued by Furness, Ash & Co. between January 1, 1878, and March 16th, 1878, which you have already given, what appears to have been the amount of their loans from the Commercial National Bank and Newbold, Son & Co. during the same period, and what was the balance of said loans to each outstanding at the time of the failure?

[A.] The loans from Newbold, Son & Co. were $51,600, of which $18,000 were outstanding at their failure; from Commercial National Bank, $16,000, all of which was outstanding.

Q. Can you tell us the amount of business done by Furness, Brinley & Co. the first three months of 1877, as compared with that done by Furness, Ash & Co. between January 1, 1878, and March 16, 1878?

A. Between January 1, 1877, and March 16, 1877, they sold $46,643, and during the same period in 1878 Furness, Ash & Co. sold about $12,000, as has been stated before, and in the last two weeks of 1877 Furness, Brinley & Co. sold about $12,748.72.

The expenses of the firm of Furness, Brinley & Co. during the first three months of 1877 amount to about $4,000, but the ledger accounts seem very imperfect. I never saw a set of books in all my life more carelessly and incompletely kept.

L. C. SIMON.

Sworn and subscribed to before me—

SUSSEX D. DAVIS, *Examiner.*

Adjourned to June 12, 1879, at 12 o'clock m.

JUNE 12, 1879.

The parties not appearing, the meeting was adjourned to June 19, 1879, at 12 o'clock m.

94 JUNE 19, 1879.

The examiner having been called out of town, the meeting was adjourned to June 26, 1879, at 12 o'clock m.

JUNE 26, 1879.

Present: Nathan H. Sharpless, Esq.

Mr. Sharpless says:

Mr. Examiner, I now tender Mr. Lemuel C. Simon to the other side for cross-examination.

None of the defendants or their counsel being present, although notified by Mr. Sharpless that he would make the above tender.

No cross-examination.

Adjourned to June 26, 1879, at 12 o'clock m.

JUNE 26, 1879.

None of the parties being present, the meeting was adjourned to July 3, 1879, at 12 o'clock m.

JULY 3, 1879.

Present: Mr. Sharpless.

Mr. Sharpless offered in evidence all of the papers heretofore shown to witnesses and the various exhibits, as heretofore marked, and closes his case.

He also gives in evidence the record of the bankruptcy of James T. Furness, Joshua P. Ash, and William H. Ash, the same having been consolidated and numbered No. 2250, in bankruptcy, in
95 the district court of the United States for the eastern district of Pennsylvania, and the several papers filed in reference thereto or in connection therewith.

Adjourned to February 25, 1880, at 12½ o'clock p. m.

FEBRUARY 25, 1880.

Present: Mr. Sharpless and Mr. Platt.

Mr. Platt gives in evidence the proofs of debt in bankruptcy, filed in the proceedings in bankruptcy by Francis Brinley, administrator of Edward L. Brinley, deceased, one of the defendants, as showing the judgment recovered against him as a member of the former firm of Furness, Brinley & Co., and paid by the said Edward L. Brinley, now deceased, individually.

Neither counsel for plaintiff nor defendant desiring to offer any

further testimony, the same is closed, and is herewith returned to court by the examiner duly appointed to take the same, under order of court dated November 4, 1880.

Respectfully submitted,

SUSSEX D. DAVIS,

October 5, 1880. *Examiner.*

96

When discounted.	Date of notes.	Am't.	1877. When paid. July.	Aug.	Sep.	Oct.	Nov.	Dec.	Jan.	Feb.	Mar.	1878.		
March 22, 1877	March 6	$2,762 75	9											
March 22, "	March 13	2,549 50	16											
May 8, "	April 1	2,122 50	----	4										
April 9, "	April 7	2,124 75	----	8										
May 8, "	April 16	2,107 85	----	17										
May 8, "	April 23	2,213 47	---	26										
June 13, "	May 3	2,117 68	----	----	6									
June 13, "	May 7	1,462 50	----	----	10									
June 13, "	May 14	2,205 92	----	----	17									
June 13, "	May 21	2,200 50	----	----	24									
June 13, "	May 27	2,397 49	----	----	29									
July 12, "	July 3	1,328 40	---	----	----	----	6							
July 12, "	June 7	1,847 50	----	----	----	10								
	June 14	1,793 94	----	----	--	17								
	June 22	1,980 75	----	----	----	25								
	June 30	1,627 40	----	----	----	31								
Aug. 23, "	July 5	2,627 40	----	----	--	----	8							
	July 12	2,291 75	---	---	---	---	15							
	July 18	2,190 50	----	----	----	----	21							
	July 26	2,339 40	----	----	----	----	28							
	Aug. 7	1,775 42	----	----	---	---	----	10						
Sept. 4, "	Aug. 6	1,702 40	---	---	---	---	----	9						
	Aug. 13	1,696 50	---	---	---	---	---	15						
	Aug. 20	1,762 40	----	----	---	----	---	22						
Sept. 17, "	Aug. 24	1,704 40	----	----	----	----	----	27						
	Aug. 28	1,847 92	--	----	----	----	----	31						
	Sept. 1	1,598 40	----	----	----	----	----	----	4					
	Sept. 6	1,663 20	----	----	----	----	----	----	9					
	Sept. 13	1,704 30	----	---	----	---	----	----	16					
Sept. 21, "	June 28	4,000 00	---	----	--	31								
	July 18	4,200 40	----	----	----	----	21							
	Aug. 17	4,364 75	----	---	----	---	---	20						
Oct. 8, "	Sep. 17	1,590 50	----	----	----	----	----	----	19					
	Sep. 22	1,532 78	----	----	----	---	----	----	25					
	Sep. 30	1,701 40	---	---	----	---	----	----	---	2				
Oct. 17, "	Oct. 1	1,542 50	----	----	----	----	----	----	----	4				
	Oct. 9	1,600 75	----	----	----	----	----	----	----	12				
	Oct. 12	1,470 40	---	---	---	----	---	----	---	15				
Nov. 10, "	Oct. 20	1,490 40	----	----	----	---	---	----	----	23				
	Oct. 24	1,440 30	---	----	---	---	---	---	---	27				
	Oct. 30	1,484 60	---	---	----	---	---	----	----	--	2			
Dec. 5, "	Nov. 5	1,802 70	----	----	----	---	---	----	----	--	8			
	Nov. 10	1,660 50	----	----	----	----	---	----	----	--	13			

97 EXHIBIT No. 1.—S. D. D.

When discounted.	Date of note.	Am't.	Borrowed Newbold, Son & Co.		Paid.
Dec. 5, 1877	Nov. 12	$1,800 64		$5,000	Aug. 14, 1877.
	Nov. 19	1,904 50		7,000	" 23, "
	Nov. 24	1,996 40	Aug. 25, 1877	3,500	Sep. 4, "
Dec. 21, "	Nov. 19	1,640 20	Sep. 10, "	8,000	" 17, "
	Dec. 3	1,800 50	Sep. 17, "	10,000	" 21, "
Jan. 8, "	Jan. 7	3,710 40	Sep. 21, "	4,000	Oct. 8, "
Jan. 24, "	Jan. 12	3,494 50	Oct. 1, "	2,000	" "
	Jan. 22	3,442 30	Oct. 8, "	5,000	" 17, "
	Jan. 28	2,884 60	Oct. 22, "	4,500	Nov. 14, "
Feb. 4, "	Jan. 7	2,740 30	Oct. 30, "	3,000	" 12, "
	Jan. 14	2,201 60	Nov. 20, "	6,000	Dec. 5, "
	Jan. 19	2,094 75	Nov. 23, "	2,500	" 5, "
	Jan. 26	1,962 40	Dec. 6, "	3,000	" 21, "
	Jan. 29	1,927 80	Dec, 12, "	2,000	" 21, "
Feb. 15, "	Feb. 4	2,638 40	Dec. 26, "	4,000	Jan. 4, 1878.
	Feb. 11	2,700 50	Jan. 2, "	3,000	" 8, "
Feb. 23, "	Jan. 23	1,471 50	Jan. 8, "	6,800	" 24, "
	Jan. 23	1,490 40	Jan. 15, "	2,800	" 30, "
	Feb. 22	1,402 70	Jan. 24, "	10,000	Feb. 2, "
	Jan. 28	1,460 40	Feb. 4, "	5,500	" 15, "
			Feb. 14, "	6,000	" 23, "
			Mch. 5, "	7,000	
			Mch. 11, "	3,000	
			Mch. 16, "	8,000	

Central Nat. Bank.	Commercial Bank.		
Sept. 10, 1877. Paid loan Feb. 23, $7,000		$6,500	July 12, 1877.
		10,000	Aug. 25, loan, dated Mch. 16.
	Aug. 25, 1877	8,000	Jan. 15, 1878.
	Sept. 4, "	5,500	Nov. 8, "
	Nov. 30, "	10,000	Dec. 8, "
	Jan. 15, 1878	6,000	
	Jan. 15, "	5,000	
	Jan. 24, "	5,000	

98 EXHIBIT "A."

In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the third circuit. April Sess., 1878.

THE PENN NATIONAL BANK, Suing, etc., *vs.* FURNESS, BRINLEY *et al.* } No. 86. In Equity.

And now, November 4th, 1878, on motion of Sharpless, for the plaintiffs, the court appoints Sussex D. Davis, Esq., examiner, to take the testimony in the above case.

A true copy, certified from the records.

SAMUEL BELL,
Clerk Circuit Court U. S.

99 (Endorsed:) In the circuit court of the United States for the eastern district of Pennsylvania. The Penn National Bank, suing, &c., *vs.* James T. Furness, Edward L. Brinley, Joshua P. Ash, Henry Day, William H. Ash, Dawes E. Furness and George D. Krumbhaar. April sessions, 1878. No. 86. In equity. Depositions of witnesses produced, sworn, and examined before Sussex D. Davis, examiner in said case, under an order of said court dated November 4, 1880, hereto annexed, marked "Exhibit A." Sussex D. Davis, examiner. Filed October 14, 1880.

100 And afterwards, to wit, on the 26th day of January, A. D. 1881, Samuel Dickson, Esq., counsel for Edward L. Brinley, comes into our said court here, and files of record a suggestion of the death of Edward L. Brinley, &c., which, being read, is as follows, to wit:

PENN NATIONAL BANK *vs.* JAMES T. FURNESS *et al.*

And now, January 26th, 1881, the death of Edward L. Brinley is suggested, and the name of Francis Brinley, administrator *cum testamento annexo* of the estate of said Edward L. Brinley, deceased, is substituted as defendant.

SAM'L DICKSON,
For Francis Brinley.

(Endorsed:) No. 86. April sess., 1878. C. C. U. S., E. D. of Pa. Bank *vs.* Furness. Suggestion of death & substitution. Filed January 26, 1881. Dickson.

101 And on the day and year last aforesaid the court made the following order, to wit:

In the Circuit Court of the United States, in and for the Eastern District of Pennsylvania.

PENN NATIONAL BANK *vs.* FURNESS *et al.* } No. 86. April Sess., 1878. In Equity.

And now, January 26th, 1881, by consent of the counsel for the respective parties, it is ordered that the above cause in equity be referred to Sussex D. Davis, Esq., register in bankruptcy as master, to report to the court the facts in the cause, and his opinion thereon.

By the Court.

(Endorsed:) No. 86. April sess., 1878. C. C. U. S., E. D. of Pa. Penn National Bank *vs.* Furness *et al.* Order referring cause to Sussex D. Davis as master. Entered & filed January 26, 1881.

102 And afterwards, to wit, on the 3d day of October, A. D. 1881, the master files his report, with the exceptions of the complainant annexed, which, being read, is as follows, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1878.

In the matter of THE PENN NATIONAL BANK, Suing, etc., *vs.* JAMES T. FURNESS, EDWARD L. BRINLEY, JOSHUA P. ASH, *et al.* } No. 86. In Equity.

To the honorable the judges of said court:

The master appointed by the court in the above cause respectfully reports that under said appointment he was attended on the
103 sixteenth day of March, 1881, at 12 o'clock m., and at subsequent meetings fixed by adjournments and notices, by Nathan H. Sharpless, Esq., for complainants; Walter L. C. Biddle and Charles Hart, Esqs., for the defendants, James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness; Samuel Dickson, Esq., for the defendant, Edward L. Brinley; and Henry G. Ward, Esq., assignee in bankruptcy of James T. Furness, Joshua P. Ash, and William H. Ash, individually and as copartners, late trading as Furness, Ash & Co.

The cause comes before the master upon bill, answer, and proofs.

The bill charges that in the month of October, 1877, the firm of Furness, Brinley & Co., composed of James T. Furness, Edward L. Brinley, Joshua P. Ash, Henry Day, William H. Ash, and Dawes E. Furness, being solvent, and the members thereof, with the exception of Edward L. Brinley and Henry Day, being also insolvent, the defendants, James T. Furness, Edward L. Brinley, and Joshua P. Ash, fraudulently combined and contrived to dissolve said partnership, and pay to the said Edward L. Brinley the sum of $25,000 as the pretended amount of his capital therein, and to further these measures by creating a new firm of Furness, Ash & Co., upon whom the indebtedness of Furness, Brinley & Co. should be carried over by renewals of old and discounts of new commercial paper, and upon whose credit the amount of $25,000 should be borrowed
to pay the said Edward L. Brinley, as provided in a certain
104 agreement, dated October 22, 1877, the end and scope of the scheme being to allow the said Edward L. Brinley not only to escape liability upon his individual estate for the debts of the firm of Furness, Brinley & Co., and to withdraw the sum of $25,000 from a source whence he was entitled to nothing, but to throw the indebtedness of Furness, Brinley & Co. upon (and to obtain the means for making this unjust payment by the discount of the paper of) a firm without capital, to be composed of the insolvent members of the firm of Furness, Brinley & Co.

It is is further charged that said fraudulent scheme was carried out by the defendants in the manner set forth in the bill, and $20,000 of the $25,000 agreed to be paid to Brinley actually paid him.

The prayer of the bill is that the said Brinley may be held and treated as really a copartner in the firm of Furness, Ash & Co., and may be ordered and decreed upon an account taken of the assets of said firm to make good to the complainants and other creditors

of Furness, Ash & Co. the amount of the debts due them by said firm.

George D. Krumbhaar, a formal but not a material defendant in the cause, the voluntary assignee of Furness, Ash & Co., and the members thereof individually has appeared, but has filed no answer.

Of the material defendants, Henry Day has neither appeared nor answered, and James T. Furness, Joshua P. Ash, William H. Ash, and Dawes E. Furness have appeared and filed a joint answer, in which they admit the partnership of Furness, Brinley & Co.

They also admit that from an examination and settlement of the books made since March 15, 1878, on which day the firm of Furness, Ash & Co. failed, it now appears that the firm of Furness, Brinley & Co. was insolvent on July 1, 1877. They do not admit, however, that they were on that day insolvent as to their individual estates, but believe, on the contrary, that their individual estates were on that day sufficiently to meet all the liabilities of the firm of Furness, Brinley & Co.

105 They also admit that on October 22, 1877, Edward L. Brinley, James T. Furness, and Joshua P. Ash did make the agreement dated October 22, 1877, and that on January 1, 1878, James T. Furness, Joshua P. Ash, and William H. Ash continued business as the successors of Furness, Brinley & Co., under the firm name of Furness, Ash & Co., until March 15, 1878, when they failed.

They also admit that the books of Furness, Brinley & Co. did not on July 1, 1877, show the true condition of the firm, and give as an explanation thereof: That whenever any of the partners drew money for their current expenses the sum so drawn were charged on slips of paper, and sometimes in a memorandum book with the intention subsequently to charge the aggregate to the individual account of the respective partners. That this was neglected to be done, and is the one particular in which the firm books did not accurately set forth the affairs of the partnership.

That James T. Furness, the senior member and head of the house, had the exclusive control of the books. None of the other members took any part in the supervision of the same, and had committed this department to his individual care.

That James T. Furness was solely responsible for any neglect, and he states that he assumes the same as an act of simple justice to his partners. That it had always been his intention to charge these sums in the books, but had put it off from time to time. That without wishing or making an effort to conceal the fact from his partners, yet at the same time they were not familiar with the fact, nor did he himself know to what extent the books were deficient as to accuracy in this respect, until shown by an examination made after the failure of Furness, Ash & Co.

James T. Furness and Joshua P. Ash, in this answer, deny absolutely and without qualification or evasion the charge in the fifth paragraph of the bill of fraudulent combination with Brinley to dissolve the partnership Furness, Brinley & Co. James T. Furness says that he believed Brinley to be entitled to at least as much as

106 was specified in the agreement of October 22, 1877. That he

so stated in good faith to Joshua P. Ash, who, relying upon that statement, did not hesitate to affix his signature thereto. They deny, and William H. Ash joins therein, that they had any intention to permit Brinley to withdraw any more money than they honestly believed he was entitled to, and deny that the firm of Furness, Ash & Co. was created for the purpose of enabling them to carry out that or any other fraudulent purpose or scheme, but the said firm was formed in good faith to continue the same business as Furness, Brinley & Co. and their predecessors had carried on for more than sixty years.

Edward L. Brinley, another of the defendants, has answered separately. He admits the partnership of Furness, Brinley & Co., but denies that the insolvency of the said firm appeared on its books. He admits the agreement of October 22, 1877, and says that he believed that the statement of facts therein contained was true and correct, and that his capital in the firm was at least $25,000; that by the articles of copartnership, dated July 1, 1851, each of the partners (James T. Furness, Edward L. Brinley, and Joshua P. Ash) was required to pay into, and keep in the firm, a capital of $20,000; that he intended to and did so, and that on October 23, 1877, he not only believed the firm to be solvent, but he believed his partners had large individual estates. That he believed James T. Furness to be worth upwards of $100,000, and Joshua P. Ash to have a large individual estate; that he knew nothing of the manner in which the firm of Furness, Ash & Co. carried on its business; that he believed it to be solvent; that he had nothing to do with the negotiation of their paper, and made no statement as to their insolvency with the view of influencing any one.

That he received $20,000 of the $25,000 stipulated to be paid him by the agreement of October 22, 1877.

That after the failure of Furness, Ash & Co. he discovered that the assets of Furness, Brinley & Co. were practically gone. Whereupon he sold and mortgaged his property to take up the outstanding
107 liabilities, amounting to nearly $40,000, expecting that Day, who was equally liable to pay, would do the same, but that he has kept out of the way and thrown every obstacle in the way of creditors who sought to recover from him.

He also says that he has paid out more that he had received, and is still liable for some thousands additional.

He states, as an explanation of his ignorance of the true condition of the affairs of the firm, that he was never an accountant, but always depended upon J. T. Furness to manage the affairs of the firm, and even to look after his (Brinley's) own private affairs; that the business had always been fairly profitable, and no heavy losses had been incurred; that he asked that the dissolution should be made to take effect as of July 1, 1877, because he was told that Day was to retire on that date, and he supposed the firm had made little or nothing during the summer months; that he never had any communication with any one on the subject of Day's withdrawal, except possibly a letter from Day, of which, however, he is not certain; that he has no knowledge as to the sources from which the pay-

ments to him (Brinley) were made; and that he desires to give "a most sweeping, unqualified, and complete denial to the charge or insinuation that he 'ever made any false statement with a view of bolstering up the firm of Furness, Brinley & Co.'"

It appears from the evidence that the drawings of J. T. Furness, E. L. Brinley, and J. P. Ash were not charged to their several accounts from February, 1875, until the failure of Furness, Ash & Co., on March 15, 1878, while the drawings of D. E. Furness, W. H. Ash, and Henry Day were regularly charged as made.

When entered, the accounts of the several partners stood on the books as follows: (Edward L. Brinley having first been charged with $20,000 of the $25,000 agreed to be paid him under the agreement of October 22, 1877.)

108	Edward L. Brinley, a creditor partner for ------	$1,889 54
	Dawes E. Furness, " " " ------	50 80
	James T. Furness, a debtor partner for ----------	52,347 28
	Joshua P. Ash, " " " ----------	21,672 97
	Henry Day, " " " ----------	4,128 58
	William H. Ash, " " " ----------	3,873 90

It thus appears that, as between the partners, Brinley was a creditor of the firm on March 15, 1878, for $1,889.54, exclusive of a sum of $6,644.76, claimed to be due on his account "No. 2," to be found on folio 101 of private ledger; the other partners, with the exception of D. E. Furness, having largely overdrawn their accounts.

The sums as drawn by J. T. Furness, E. L. Brinley J. P. Ash, and William H. Ash, but not charged, were treated as cash on hand in the balance sheets of the firm, struck from time to time by J. T. Furness.

Thus of an apparent amount of cash on hand on July 12, 1877, of $136,737.43, there was really on hand but $13,828.51, and of apparent cash on hand December 31, 1877, say $131,346.95, there was actually but about $15,000.

It further appears from the evidence that the indebtedness of Furness, Brinley & Co. on July 1, 1877, the day of the dissolution as between Brinley and the firm of Furness, Brinley & Co., was $90,110.16, against $53,400.36 available assets, and $28,233.13 worthless assets, and on January 1, 1878, there was an indebtedness of $106,966.61, against, say, $36,439.88 of good assets, and $31,327.42 of worthless.

It further appears that, of the $106,966.61 due on January 1, 1878, there had been paid by Furness, Ash & Co., the new firm, at the time of their failure, $68,373.27, either in cash or by giving their own paper, or by both, leaving still due by the firm of Furness, Brinley & Co., $38,593.34.

This balance of $38,593.34, Brinley, as appears from the evi-
109 dence, commenced to pay individually, immediately after the failure, the first payment, one of $18,124.16, having been been made on April 23, 1878, so that on November 18, 1878, he had discharged $34,280.47 of the principal of said indebtedness, and had

also paid $2,458.63 interest on the debts so paid; there was, therefore, unpaid on that date but $4,215.03. Mr. Brinley died in October, 1879, and since then his administrator has paid $2,684.97 principal and $350.76 interest of said balance of indebtedness of $4,215.03; so that out of an indebtedness of $38,593.34 owing by Furness, Brinley & Co. at the time of the failure of Furness, Ash & Co., all but $1,580.06 has been paid by Mr. Brinley or his estate. These payments were made without litigation, he recognizing his moral as well as legal obligation therefor.

It thus appears that Mr. Brinley and his estate have paid out $19,732.87 more than he received under the agreement of October 22, 1877.

The master reports the following facts, namely:

First. That as between Brinley and the other partners of Furness, Brinley & Co. the former retired on October 22, 1877, as of July 1, 1877, and as to the public or creditors on January 1, 1878.

Second. That the firm of Furness, Brinley & Co. was insolvent on July 1, 1877, on October 22, 1877, and on January 1, 1878.

Third. That the new firm of Furness, Ash & Co., composed of James T. Furness, Joshua P. Ash, and William H. Ash, by assuming the liabilities of Furness, Brinley & Co., their predecessors, no additional capital having been contributed, commenced the business of said new firm with liabilities exceeding their assets.

Fourth. That of the liabilities of Furness, Brinley & Co. $68,373.27 were paid by Furness, Ash & Co., either in cash or in their own notes, and $37,013.28 by Brinley, in cash.

110 Fifth. That of the $25,000 agreed to be paid by Brinley under the agreement of October 22, 1877, $20,000 thereof was paid as follows:

$5,000 on December 1, 1877, by Furness, Brinley & Co.
$5,000 " 31, 1877, " " " "
$5,000 on February 1, 1878, by Furness, Ash & Co.
$5,000 on March 6, 1878, " " " "

Sixth. That Brinley has paid out to the creditors of the firm of Furness, Brinley & Co. $17,013.28 more than he received under the agreement of October 22, 1877.

Seventh. That the fact that the firm of Furness, Brinley & Co. was insolvent must have been known to J. T. Furness to more or less extent, but that he did not inform his partners of the same.

Eighth. That there has been no evidence produced before the master to show that either Brinley or any of the other partners, except J. T. Furness, knew of such insolvency; all the evidence on that subject going to prove that they did not, and that had the books been examined by the several partners they would not have shown it, as the various drawings of the several partners, amounting in the aggregate to $122,908.92 on July 12, 1877, were not entered until March, 1878.

Ninth. That in October, 1877, J. T. Furness, E. L. Brinley, J. P. Ash, and W. H. Ash were solvent, as to their individual estates and debts.

Tenth. That there was no collusion between Brinley, J. T. Furness, J. P. Ash, and W. H. Ash in the agreement for the withdrawal of Brinley and the payment to him of $25,000, nor was the same done to defraud the then creditors of Furness, Brinley & Co., nor any creditors of any firm which might succeed them.

111 Upon these facts the question arises, what is the responsibility of the estate of Edward L. Brinley, now deceased, to the creditors of Furness, Ash & Co.?

It was contended before the master by Mr. Sharpless, counsel for the complainants, that the circumstances surrounding the retirement of Mr. Brinley showed actual fraud on the part of Brinley, J. T. Furness, and J. P. Ash, and that the three were in collusion to allow the former to retire from the firm at a time when they knew it to be insolvent, and thus escape any responsibility for the debts of the firm.

It was also contended that if the master found no evidence of actual fraud, yet that an agreement of dissolution had under such circumstances was constructive fraud upon those persons dealing with and giving credit to the new firm.

The authorities cited to sustain the position of the plaintiffs were as follows:

"If instead of a share of the capital on its profits there is nothing to be apportioned but a loss, the retiring partner necessarily stands in the same situation as the other partners, and cannot set up any claim in opposition to real creditors. Upon this principle it has been held that an agreement, by which one partner permitted the other partner (who seceded from the partnership at the time it was insolvent) to withdraw money out of the reach of the joint creditors, was fraudulent and invalid, and the retiring partner was compelled to refund. But where no fraud is intended or practiced, and the dissolution is fairly made between the partners, an agreement by one to give to the retiring partner a sum of money for his interest in the concern will not be invalidated by the circumstance *per se* of the joint effects being insufficient to pay the joint debts."

Gow on Partnership, 2d ed., *p. 360.

112 "There is another case in which a retiring partner may be, notwithstanding notice of his withdrawal, responsible, not only for the past debts of the old firm, but for the new debts contracted by the new firm, and that is in a case of positive or constructive fraud. This may take place when upon the actual insolvency of the firm, known to all the partners; they permit the retiring partner to withdraw a portion of the partnership funds out of the reach of the joint creditors of the new firm, for the purpose of cheating or defrauding the latter, for in such a case the fraud vitiates the whole transaction, and the retiring partner will be held liable to the full extent of all the funds so fraudulently withdrawn. But the mere fact that a retiring partner knows at the time that the partnership is insolvent will not of itself involve him in any liability for the new firm, or vitiate the dissolution, if it was without any inten-

tion of fraud and entirely consistent in all its circumstances with good faith."

Story on Partnership, 5th ed., sec. 163.

"A partner desirous of retiring from an insolvent firm is at perfect liberty to sell his interest in it for any sum the continuing partners think proper to give him, and a sale by him to them cannot be set aside or impeached as a fraud upon the creditors of the firm unless there be clear evidence *aliunde* of such fraud. At the same time the present share of a partner in an insolvent firm is obviously less than nothing, whatever may be the amount of the capital brought in by him. Consequently, a partner who retires from an insolvent firm and withdraws from it a sum of money which he is pleased to call his share is defrauding the creditors of the firm, and such a transaction cannot stand, and it may be impeached by the assignees in bankruptcy of the continuing firm."

Lindley on Partnership, *611.

The law thus laid down in Gow, Story, and Lindley, above quoted, is based on a decision of Lord Loughborough's in Anderson
113 *vs.* Maltby, 4 Brown's Ch. Rep., *423, and 2 Vesey, Jr., 244, which was cited and strongly relied upon by the counsel for the plaintiffs.

That case was as follows: A father and two sons being in partnership, one of the sons retired in 1784. No public announcement of dissolution was made, the firm name on the books of the Bank of England, and the firm books simply being changed from Maltby & Sons to Maltby & Son.

In 1786 an account was entered on the firm books, claimed to be from an agreement made in 1784, by which it appeared there was due him July 1, 1784, £9,655 16s. 7p.; when he retired he withdrew £3,904, and in 1788, a few days before the failure of the firm, a payment was made him of £9,467 14s. 2p. The firm being in bankruptcy he claimed to be a creditor for £3,678 11s. 7p., and offered to prove for that amount. This he was admitted to do, the dividend being retained, and a bill being filed against him.

It was in evidence that when the son (Thomas Maltby) retired that the concern was in an insolvent condition.

The defendant by his answer rested on the account, but stated that he believed that if at the time of dissolution an allowance for bad debts had been made the firm would have been insolvent. That suspecting such insolvency, and also not approving of the manner in which the business was conducted, he determined to quit and seek payment of what was due him from the other partners. He admitted there was no public notice of dissolution, nor any deed or settlement of the books.

The Lord Chancellor said during argument: "That forasmuch as he was really and *bona fide* a creditor of Brough and George Maltby at the determination of the old and the commencement of the new partnership he shall be allowed all that has been paid, and if that is not enough, he may come in under the commission."

And in his opinion said: "When partners make up an account of profits which do not exist, it is colourable. Here, as the trade was not profitable, the accounts are fallacious. The defendant
114 knew whether there was a profit in a given year or not. * * * As to letting the transaction stand, this could not be called a court of equity, if it could be supported in the extent to which it has gone. * * * * If at the close of the former partnership he was *bona fide* entitled, all the payments were just and legal; if he was not *bona fide* entitled to any demand on account of the former partnership, but that to the knowledge and conviction of all three was mere colour and not a real but a nominal transaction; all the payments were made, not merely without consideration, but upon a bad consideration, and such as a court of equity, and I think a court of law equally, ought to condemn. * * * * Unless there is a real profit on the books, it is allowing him nothing. It is moonshine, and the whole account is a mere fictitious account. The case resolves itself into a plain question, whether in 1784, upon the 1st of July, the defendant was *bona fide* a creditor of the other two, then about to enter into a new partnership. If not, if all this transaction is to be void, under the colour which it presents itself to me, it is an imposition, not upon them only, because they were consenting, but upon the creditors."

This decision has been much criticized, and limitations thrown about it in various decisions following after. They all tend to make it apply to cases of actual intelligent fraud, that is to say, fraud meditated on before being put into execution.

In the opinion of the master the exact construction to be put upon it is to be found in what was said *ex parte* Peake, 1 Madd., 357, which was a case where A & B, being in partnership, A retired, B agreeing to pay him a certain sum for his interest, upon B failing shortly after, and proceedings in bankruptcy being had, A sought to receive the amount due him, which was resisted by the assignees of B, who claimed that if the partnership of A & B had been wound up at the time of the dissolution it would have been found to be insolvent, and A jointly liable for such deficiency, that the
115 dissolution was therefore invalid and fraudulent, and the doctrine in Anderson *vs.* Maltby, 2 Ves., Jr., 244, applied.

It was, however, held that "one partner may agree with retiring partners to give him a sum of money for the concern, though they know the partnership to be insolvent provided no fraud was intended."

In that case, the Vice-Chancellor (Sir Thomas Plemmer) said: "I admit that if two copartners entered into a contract, for the purpose of defrauding their joint creditors, the one agreeing to permit the other to withdraw money out of the reach of the joint creditors, such a contract is fraudulent and invalid. That I take to be the principle upon which Anderson *vs.* Maltby, was decided, it has been said, that case has been shaken by the Lord Chancellor, however that may be, and whatever may be its authority, it does not appear to affect the present case. In that case there was strong ground to believe a fraud was intended, and it does not warrant me in declar-

ing generally that the mere circumstance of the partnership being at that time in such a state that their joint effects were not sufficient to pay their debts will *per se* be sufficient to invalidate a dissolution of partnership made fairly between themselves."

A careful examination of the case of Anderson *vs.* Maltby shows that the facts which appeared to the mind of the Lord Chancellor as establishing fraud were:

First. That the account on which payments had been made was fictictious, and that the alleged indebtedness had no foundation in fact; and,

Second. That the whole transaction was a scheme of the father and the two sons to defraud creditors, the son Thomas being paid money never due him.

The notes to the case as reported in both Brown and Vesey, Jr., are to the same effect.

116 Applying the law laid down in Anderson *vs.* Maltby, and the text books above referred to, to the facts of this case, does it appear to have been such a transaction as constitutes positive a constructive fraud?

First. As to positive fraud, it is admitted that the firm of Furness, Brinley & Co. was (as the master has reported above) insolvent on July 1, 1877; October 22, 1879, and January 1, 1878; if, therefore, J. T. Furness, Brinley, and J. P. Ash, with a knowledge of the firm's insolvency, had executed the agreement of October 22, 1877, and had carried it out so far as it was carried out, by paying Brinley $20,000 of the $25,000, and he had, on the failure of Furness, Ash & Co., and the public disclosure of the true state of Furness, Brinley & Co.'s affairs, refused to pay any of the debts of Furness, Brinley & Co., and had taken such steps as made collection thereof difficult or impossible, there would then have been a case of actual fraud on creditors, if done for the purpose of allowing Brinley to escape responsibility as to share of the firm debts which would have brought it absolutely within Anderson *vs.* Maltby.

This is not what was done, nor is there any evidence that Brinley or J. P. Ash knew of or had reason to suspect the insolvency of the firm.

The evidence shows beyond all peradventure that immediately on the failure of Furness, Ash & Co., Brinley made arrangements to pay all the outstanding debts due by the old firm, and did pay them as before stated to the amount of $34,280.47 himself. This certainly was not the conduct of a man who had colluded with his other partners to defraud creditors.

The master cannot but conclude from the evidence, and particularly an inspection of the books as finally closed by J. T. Furness, that he either knew that the firm was insolvent or in a very critical condition, and was afraid to look at the true state of its affairs, at the financier of the concern he could not but have known that is was very much embarrassed.

117 Nothing has been shown to contradict the statement of Brinley that he had always kept his capital at $25,000, as agreed upon, and that he believed the others did the same, or that

of J. P. Ash, that he relied upon the statement of Mr. Furness that Mr. Brinley had at least as much as was specified in the agreement of October 22, coming to him, and that he did not hesitate for a moment to sign it, while all the circumstances corroborate their statements.

To Brinley and J. P. Ash the books would have conveyed nothing; they were fair on their face, and the balance-sheet taken off by J. T. Furness as late as July 12, 1877, showed cash on hand to the amount of $136,737.43, which, if correct, would have made the concern not only solvent but able to pay back capital to the several partners.

It is to be observed in this connection that it was on the basis of "cash on hand, $136,952.39," as appears in the "cash balance" book, September 29, 1877, Mr. Brinley's share was calculated in the agreement at $25,000.

With this balance-sheet before them, it is not strange that both Brinley and J. P. Ash should have both stated, under oath, that they not only did not know that their firm was insolvent, but that they had no reason to believe or think it was so.

Second. As to constructive fraud.

In the passage above quoted from Story on Partnership, he speaks of "positive or constructive fraud." The master, after a careful examination, has failed to find any case in which a withdrawal by a partner in good faith from an insolvent firm, and the payment of money to him has been held to be constructive fraud in the absence of proof of positive fraud—the good faith of the parties seems always to be the touchstone applied to the transaction, even if constructive in the absence of positive fraud, is to be presumed in such a case, this is not one which would warrant a conclusion of fraud of any kind.

"Legal or constructive fraud includes such contracts or
118 acts as though not originating in any actual evil design or contrivance to perpetrate a fraud, yet by their tendency to deceive or mislead others, or to violate private or public confidence, are prohibited by law."

Bouvier's Law Dict., Art. Fraud, 615.

In the opinion of the master, the conduct of Brinley completely rebuts any presumption of positive or constructive fraud. he acted entirely in accordance, with not only his rights but the law, when upon the failure of Furness, Ash & Co., he paid the creditors of Furness, Brinley & Co.

The dissolution of that firm had been duly advertised, and circulars sent out to all persons with whom it had business. These notices stated the dissolution of the firm, and the formation of a new one, under the name of Furness, Ash & Co., Brinley retiring; they were distinct and unequivocal, and any dealings had thereafter with the new firm, could not have been on the faith of any responsibility by him.

Further, of the $20,000 paid him, $10,000 had been paid him by the old firm before December 31, 1877, and $10,000 by the new, and

there was actually in the hands of the new firm, primarily liable for the payment of the old firm's debts, cash on hand about $15,000, and bills receivable and other goods, assets, to the amount of $21,439.88.

Had these assets, which as a whole were good, and were all collected by Furness, Ash & Co., been deposited in bank to the credit of the old firm of Furness, Brinley & Co., or held apart from the property or assets of the new firm, and been earmarked as belonging to the old, it is clear that the creditors of the new firm would not been allowed to participate therein on a distribution and the marshalling of assets of the two firms. In the case of Potter, assignee of J. R. Hicks & Co. *vs.* Hicks, Magee, *et al.*, lately decided in this court, it was (during the proceedings) ordered, without objection, that a fund belonging to the firm of J. R. Hicks & Co., which had preceded that of Hicks, Magee & Co., in the possession of the latter, but held separate and apart by them, should be paid over to the assignee in bankruptcy. There was an earmark
on $10,000 of the money paid Brinley in November and
119 December, 1877, and as there is nothing to show that the two subsequent payments of $5,000 each made in February and March, 1878, were not directly derived from the assets of Furness, Brinley & Co., the whole $20,000 received would have undoubtedly constituted a part of a fund directly applicable to the payment of the debts of the old firm, if Brinley had not already paid them; that is, if a bill had been filed by the creditors of the old firm, or the assignee in bankruptcy of the new, and a recovery had been had, the sum so received would have been distributable only among the creditors of the firm of Furness, Brinley & Co., such a distribution was anticipated by Mr. Brinley, and a more rapid and less expensive one had.

It was further contended by counsel for the plaintiffs that, independent of any charge of fraud, they had an equity to demand an account of the estate of Brinley, as to the moneys loaned by them to Furness, Ash & Co., which it was claimed were unjustly used by that firm for the relief of Brinley from the debts of Furness, Brinley & Co., otherwise he and his copartners would escape through a fraud practiced upon them, of which Brinley was chargeable with knowledge. And also that said payments to Brinley were made without the knowledge or consent of W. H. Ash, one of the partners in Furness, Ash & Co., and was therefore recoverable to creditors.

Though the first of these propositions is stated as being independent of the charge of fraud, the argument, nevertheless, was based on the argument that Brinley and his estate "escape through a fraud practiced on us."

As to the question of fraud thus involved, the master has before reported that there was neither positive nor constructive fraud.

On the second point, to wit, that Brinley was liable to repay the sums received by him, because made without the knowledge or consent of W. H. Ash, counsel for the plaintiffs, cited as follows:

120 "If the assets of a firm, A, B, and C, are applied to pay the debts of a former firm of A and B without the consent of C,

it would seem as A and B would be liable to answer *in solido* to the firm of A, B, and C. A and B must in equity be held *in solido* to C for his share of such debts."

Sharswood, J., Raignel's Appeal, P. F. Smith, p. 234, 255.

In the opinion of the master that case is neither parallel nor analogous to this. In that the assets of a firm of A, B, and C were applied to pay the debts of a former firm of which C was not a member, and for which he was not liable, without his consent. In this, while it is true that J. T. Furness and J. P. Ash did pay Brinley money, some of which was from the old firm, and the remainder of which is not shown to have come from the assets of the new firm, without the consent or knowledge of W. H. Ash; yet the money so paid ultimately found a normal course of distribution among the creditors of the firm of Furness, Brinley & Co., of which J. P. Ash was a member, and for the debts of which he was therefore individually and as a partner responsible, W. H. Ash therefore has no ground of complaint.

At the same time it is to be observed that although W. H. Ash stated that the payments made to Brinley were made "without his knowledge or consent;" yet he also says that it was not contemplated by the firm or himself that he "should be consulted as to such matters."

Counsel for plaintiffs also cited as follows:

"A firm dissolved in May, giving notice by publication, and authorizing one to use the firm name as liquidating partner in August, without the knowledge of his fellows; he drew notes payable to the firm, endorsed them with the firm name, had them discounted by bankers with whom the firm had never had dealings, the proceeds of the notes passed to the individual credit of the partner making them; there was evidence that the proceeds were applied to
121 the firm debts; held, that if the notes were *bona fide* for liquidation, and the proceeds applied to payment of firm debts, the other partners would be liable."

Lloyd *vs.* Thomas, 29 P. F. Smith, 68.

"After the dissolution of a partnership it has been held that the liquidating partner may borrow money to pay a firm debt and give a firm note for it to the lender, but it never has been held that every member of a dissolved firm may do the same without any authority from the other members of the firm."

McCowan *et al.-vs.* Cubbison, 22 P. F. Smith, 358.

Those cases above cited do not, in the opinion of the master, bear on this case. The question involved in them was as to the power of a liquidating partner to sign notes with the firm name in order to raise funds to pay partnership debts.

Here there was no liquidating partners. J. T. Furness and J. P. Ash, by the agreement of October 22, 1877, guaranteed Brinley individually against the firm debts, and thus have precluded themselves from issuing paper of Furness, Brinley & Co., and in fact did not do so.

In conclusion, the master reports that in his opinion the bill heretofore filed by the complainants in this cause should be dismissed.

The master further reports that James T. Furness, Joshua P. Ash, and William H. Ash having filed individually petitions in voluntary bankruptcy, the same were, by order of the register in charge of the case (the master), consolidated on September 1, 1878, and made copartnership as well as individual, and a joint and separate adjudication had.

On October 25, 1878, Henry G. Ward, Esq., was appointed assignee in bankruptcy and duly confirmed as such by the court. That among the proofs of debt filed in the case were two by Fran-
122 cis Brinley, administrator *d. b. n. c. t. a.* of Edward L. Brinley, deceased, (the principal defendant in this suit), against James T. Furness and J. P. Ash, individually; one proof being for $26,439.10, and represent debt, and interest thereon paid by Brinley for Furness, Brinley & Co., and the other for $18,879.30, is partly for debts of that firm paid by him, and partly for amount claimed to be due Brinley on a settlement of the partnership accounts between the several partners in Furness, Brinley & Co. These proofs the register allowed to be filed provisionally. Exceptions thereto being filed by N. H. Sharpless, Esq., as representing the complainants, and by Henry G. Ward, Esq., the assignee in bankruptcy.

The deposition for proof of debt for $26,439.10 recites that the same is made under the guarantee contained in the agreement of October 22, 1877, in which J. T. Furness and J. P. Ash guarantee E. L. Brinley "against any liability for any debts incurred or losses made since" July 1, 1877.

The statement in the proof for $18,879.30 recites that it is the "balance found to be due the estate of the said Edward L. Brinley, deceased, on a settlement of account between the several members of the firm of Furness, Brinley & Co."

Counsel for the complainants as creditors has excepted to the filing of these proofs and the allowance of dividends thereon—

First. Because this suit is pending; and,

Secondly. Because the estate of Brinley was seeking thereby to participate in the distribution of a fund which should first be applied to the payment of debts of Furness, Brinley & Co., or renewals thereof, the debt of the exceptants proved in the case, and that of others standing in like case with them, having been contracted substantially for the purpose of raising funds to pay the indebtedness of said Furness, Brinley & Co.

H. G. Ward, Esq., the assignee in bankruptcy of Furness,
123 Ash & Co., has excepted to the proofs for $18,879.30, for the reason that he believed the balances therein were produced by including as assets of the firm property of no pecuniary value whatever, and that so far as they depend upon the payment of a due bill of $10,000, they should have been confined to the amount of contribution which E. L. Brinley would have been entitled to receive from each of his said partners on account of a payment of a firm debt.

Holding the views that the master does as to Brinley's retirement, that is, that he retired in good faith, with no intention of defrauding the creditors of Furness, Brinley & Co., or the creditors of the firm succeeding it; that his retirement was made public by advertisement and notices; that any credit given to Furness, Ash & Co. was given on the credit of that firm, and the individual members thereof, alone shown by the fact that with the exception of one creditor who loaned money, all the others who had done so, or had discounted the paper of Furness, Ash & Co., had, either in whole or in part, the individual endorsement of J. T. Furness, the master, as register, is of the opinion that when the estate of Edward L. Brinley, deceased, shall have paid or satisfied all of the joint creditors of Furness, Brinley & Co., the said estate will be entitled to prove whatever sum shall be found to be due it (upon a full and final settlement of the accounts of the several partners) (from J. T. Furness and J. P. Ash, under the agreement of October 22, 1877,) credit being given said estate for all debts due by the firm of Furness, Brinley & Co., and assumed by J. T. Furness and J. P. Ash, which have been paid by it or by Brinley himself.

The law on the subject is clearly to this effect:

"If there never were any joint debts, or if all those which once existed have ceased to exist, either because they have been paid, barred, satisfied, or converted into separate debts, then one
124 partner who is a creditor of another may, on the bankruptcy of the latter, prove against his separate estate in competition with his other separate creditors."

Lindley on Partnership, *1011, 1012.

Also, Robson on Bankruptcy, 674, 675.

And *Ex parte* Grazebrook, 2 Dea. & Chit., 186.

All of which is respectfully submitted.

SUSSEX D. DAVIS, *Master.*

June 4, 1881.

125 The master further reports:

That having notified all parties in interest of the filing of his report on June 24, 1881, N. H. Sharpless, counsel for the complainants, has filed with the master exceptions to said report, which are hereto annexed, marked "A."

The master further reports that he has carefully examined the same, but he does not consider said exceptions well founded or sufficient.

He has, therefore, overruled the same, and returned them for the consideration of the honorable court.

The master further reports that in response to the request contained in the first of said exceptions, that he would "refer to said evidence, and especially to that of the schedules of assets to which reference is made," he states that the same is taken from the books of Furness, Brinley & Co., in evidence in the case (pp. 13–52), and particularly from—

Ledger marked "S. D. D., Exhibit E."
Bills receivable, books " " C & D."

Cash-book	"S. D. D., Exhibit A."	
Cash-balance book, 1872,	"	" Y."
Private ledger	"	" F."
Bill blotter No. 13,	"	" O."
List of bills, No. 14,	"	" B."
Sales-book	"	" G."
Balance-sheet, 7–12, '77,	"	" P."

In answer to the request contained in the fourth of said exceptions, that the master should "refer to the evidence upon which the statements of fact herein contained are made"—

He states that James T. Furness in his evidence (p. 24) stated that "Mr. Brinley had to his credit something over $30,000, as near as I can remember without the books."

The master also states that the basis of his statement, that it was from "cash on hand, $136,952.39, Mr. Brinley's share was
126 calculated in the agreement at $25,000," is from the following figures—the same being an approximate, but not a precise calculation of assets and liabilities taken from the above-mentioned exhibits:

Outstanding credits say	$39,000 00
Cash on hand, as per cash balance-book, "Exhibit Y," September 29, '77	136,952 39
	$175,952 39
Less outstanding liabilities	91,000 00
	$84,952 39

The capital of the several partners, as per "private ledger account" in balance-sheet, July 12, 1877, "Exhibit P," is as follows:

J. T. Furness	$18,629 75
E. L. Brinley	30,733 64
J. P. Ash	25,894 03
Henry Day	10,028 96
	$85,286 38

With the exception of the assets and liabilities which the master has estimated, the other amounts given are taken from the books, as is "cash on hand, $136,952.39," from cash balance book, Ex. P, and he believes the same to be correct.

As to the calculation of Brinley's share by Mr. Furness, he said: "We made a rough calculation; that is, I did, which he assented to; after deducting his probable share of bad debts and losses it would give him some $20,000 to $25,000" (p. 24).

All of which is respectfully submitted.

SUSSEX D. DAVIS, *Master.*

June 21, 1881.

127 "A."

In the Circuit Court of the United States for the Eastern District of Pennsylvania. April Session, 1878.

THE PENN NATIONAL BANK, Suing, etc., *vs.* JAMES T. FURNESS, EDWARD L. BRINLEY, *et al.* } No. 86. In Equity.

Exceptions to the report of the master, Sussex D. Davis, Esq., to whom this cause stands referred by virtue of an order therein made January 26, 1881.

The complainants except to the said report for that—

1. The learned master has erred in reporting (p. 7): "It further appears from the evidence that the indebtedness of Furness, Brinley & Co. on July 1, 1877, the day of the dissolution as between Brinley and the firm of Furness, Brinley & Co., was $90,110.16 against $53,400.36 available assets and $28,233.13 worthless assets; and on January 1, 1878, there was an indebtedness of $106,966.61 against, say, $36,439.88 of good assets and $31,327.42 of worthless;"
128 and he is respectfully requested to refer to said evidence, and especially to that of the contents of the schedule of assets, to which reference is made.

2. He has also erred in reporting (p. 9): "That there has been no evidence produced before the master to show that either Brinley or any of the other partners, except J. T. Furness, knew of such insolvency" (that is, that of Furness, Brinley & Co.), "all the evidence on that subject going to prove that they did not, and that had the books been examined by the several partners they would not have shown it, as the various drawings of the several partners, amounting in the aggregate to $122,908.92 on July 12, 1877, were not entered until March, 1878."

3. He has also erred in reporting (p. 9): "That there was no collusion between Brinley, J. T. Furness, J. P. Ash, and W. H. Ash in the agreement for the withdrawal of Brinley, and the payment to him of $25,000, nor was the same to defraud the then creditors of Furness, Brinley & Co., nor any creditors of any firm which might succeed them."

4. He has also erred in reporting (p. 16): "To Brinley and J. P. Ash the books would have conveyed nothing. They were fair on their face, and the balance sheet taken off by J. T. Furness as late as July 12, 1877, showed cash on hand to the amount of $136,737.43, which, if correct, would have made the concern not only solvent, but able to pay back capital to the several partners. It is to be observed, in this connection, that it was on the basis of 'cash on hand, $136,952.39,' as appears in the 'cash balance' book September 29, 1877, Mr. Brinley's share was calculated in the agreement at $25,000;" and he is respectfully requested to refer to the evidence upon which the statements of facts herein contained are made.

5. He has also erred in reporting (p. 18): "It was further contended by counsel for the plaintiff that, independent of any

129 charge of fraud, they had an equity to demand an account of the estate of Brinley as to the moneys loaned by them to Furness, Ash & Co., which it was claimed were unjustly used by that firm for the relief of Brinley from the debts of Furness, Brinley & Co., otherwise he and his copartners would escape through a fraud practiced upon them, of which Brinley was chargeable with knowledge; and also that said payments to Brinley were made without the knowledge or consent of W. H. Ash, one of the partners in Furness, Ash & Co., and was, therefore, recoverable to creditors."

Though the first of these propositions is stated as being independent of the charge of fraud, the argument, nevertheless, was based on the argument that Brinley and his estate "escape through a fraud practiced on us."

As to the question of fraud thus involved, the master has before reported that there was neither positive nor constructive fraud.

On the second point, to wit, that Brinley was liable to repay the sums received by him because made without the knowledge or consent of W. H. Ash, * * * * while it is true that J. T. Furness and J. P. Ash did pay Brinley money, some of which was from the old firm, and the remainder of which is not shown to have come from the assets of the new firm, without the consent or knowledge of W. H. H. Ash, yet the money so paid ultimately found a normal course of distribution among the creditors of the firm of Furness, Brinley & Co., of which J. P. Ash was a member, and for the debts of which he was, therefore, individually and as a partner responsible. W. H. Ash, therefore, has no ground of complaint."

6. He has also erred in reporting (p. 20): "Here there were no liquidating partners. J. T. Furness and J. P. Ash, by the agreement of October 22, 1877, guaranteed Brinley individually against the firm debts, and thus had precluded themselves from issuing paper of Furness, Brinley & Co., and in fact did not do so."

130 7. He has also erred in reporting (p. 20): "In conclusion, the master reports that, in his opinion, the bill heretofore filed by the complainants in this cause should be dismissed."

8. He has also erred in not reporting a decree granting the complainants the relief prayed in their bill.

Wherefore the complainants except to the said report, and appeal therefrom to your honorable court.

NATHAN H. SHARPLESS,
Of Counsel with Complainants.

131 (Endorsed:) No. 86. April sessions, 1878. In the circuit court of the United States for the eastern district of Pennsylvania. In equity. The Penn National Bank, suing, etc., *vs.* James T. Furness, Edward L. Brinley, Joshua P. Ash, *et al.* Master's report with exceptions. Sussex D. Davis, master. Filed October 3, 1881.

132 And afterwards, to wit, on the 21st day of October, A. D. 1881, this cause came up for a hearing on exceptions to master's report, and having been argued by counsel for the respective parties, the court hold the same under advisement.

And afterwards, to wit, on the 6th day of December, A. D. 1881, the court enter the following decree, to wit:

In the Circuit Court of the United States for the Eastern District of Pennsylvania. April Sess., 1878.

THE PENN NATIONAL BANK
vs.
JAMES T. FURNESS *et al.*
No. 86. In Equity.

And now, December 6th, A. D. 1881, this cause having come on to be heard, and having been duly argued by counsel and considered by the court, it is ordered, adjudged, and decreed that the bill of complaint in the said cause be dismissed.

133 And it is furthered ordered that the said complainant do pay the costs of these proceedings.

(Endorsed:) 86. April sess., 1878. Circuit court of the United States, eastern district of Penna. In equity. Penn National Bank *vs.* Furness *et al.* Decree. Entered & filed December 6, 1881.

134 And afterwards, to wit, on the 15th day of May, A. D. 1882, the complainants, by their counsel, appear in open court and pray an appeal to the Supreme Court of the United States; whereupon the court made the following order, to wit:

C. C. U. S., E. D. of Pa. April Sess., 1878.

THE PENN NATIONAL BANK, Suing, &c.,
vs.
JAMES T. FURNESS, EDWARD L. BRINLEY, JOSHUA P. ASH, *et al.*
No. 86. In Equity.

And now, to wit, May 15th, 1882, comes The Penn National Bank, suing, &c., plaintiffs in the above-entitled case, and prays an appeal to the Supreme Court of the United States from the final decree made in this case on the sixth day of December last past (1881) dismissing their bill, with costs.

Which appeal is thereupon allowed, upon security being entered in the sum of $500.

135 (Endorsed:) 86. April sess., 1878. C. C. U. S., E. D. Pa. In equity. The Penn National Bank, suing, &c., *vs.* James T. Furness, Edw. L. Brinley, *et al.* Plaintiff's appeal to the Supreme Court of the United States. Entered & filed May 15, 1882. Sharpless.

136 In the Circuit Court of the United States in and for the Eastern District of Pennsylvania, in the Third Circuit. April Sess., 1878. In Equity.

THE PENN NATIONAL BANK
vs.
JAMES T. FURNESS, EDWARD L. BRINLEY, JOSHUA P. ASH, Henry Day, William H. Ash, Dawes E. Furness, and George D. Krumbhaar. } No. 86.

Know all men by these presents that we, The Penn National Bank, as principal, and Gillies Dallett and William L. Ludwig, as sureties, are held and firmly bound unto the above-named James T. Furness, Francis Brinley, administrator of Edward L. Brinley, deceased; Joshua P. Ash, William H. Ash, Dawes E. Furness, and George D. Krumbhaar, who were sued with Henry Day, in the sum of five hundred dollars ($500), to be paid to the said James T. Furness, Francis Brinley, administrator of Edward L. Brinley, deceased; Joshua P. Ash, William H. Ash, Dawes E. Furness, and George D. Krumbhaar, who were sued with Henry Day, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our respective heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals, and dated this 20th day of May, A. D. 1882.

Whereas lately at a circuit court of the United States in and for the eastern district of Pennsylvania, in the third circuit, in a suit depending in the said court between the Penn National Bank, as complainant, and James T. Furness *et al.*, as respondents, a final decree was rendered against the said The Penn National Bank, and the said The Penn National Bank having taken an appeal, which appeal has been allowed by the said circuit court, to the Supreme Court of the United States to reverse the said decree in the aforesaid suit:

137 Now the condition of this obligation is such that if the said The Penn National Bank shall prosecute its said appeal to effect, and answer all damages and costs if [it] fail to make its appeal good, then this obligation to be null and void; otherwise to remain in full force and virtue.

PENN NATIONAL BANK,
By GILLIES DALLETT, *Pres'd't.*

Attest: GEO. P. LONGHEAD, [SEAL.]
Cashier Penn National Bank.
GILLIES DALLETT. [SEAL.]
WM. C. LUDWIG. [SEAL.]

Sealed and delivered in the presence of—
E. C. HOPPER.
B. F. CHATHAM.

Approved in open court, May 23rd, 1882.
(Signed) SAMUEL BELL, *Clerk, &c.*

[Endorsed:] No. 86. April sess., 1878. Circuit court United

States. Penn National Bank *vs.* Furness *et al.* Bond *sur* appeal. Filed May 23, 1882.

138 THE UNITED STATES OF AMERICA, *ss:*

To James T. Furness, Francis Brinley, administrator *cum testamento annexo* of Edward L. Brinley, dec'd; Joshua P. Ash, William H. Ash, Dawes E. Furness, and George D. Krumbhaar, who were sued with Henry Day, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the eastern district of Pennsylvania, in the third circuit, wherein The Penn National Bank are appellants and you are appellees, to show cause, if any there be, why the decree rendered against said appellants, as in said appeal mentioned, shall not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness my hand, this 23rd day of May, in the year of our Lord one thousand eight hundred and eighty-two.

WM. BUTLER, *Judge.*

138½ Service of within citation on Francis Brinley, adm'r of Edward L. Brinley, deceased, is hereby accepted, & the clerk will please enter my appearance for him.

SAM'L DICKSON.

May 31, 1882.

Service of the within citation is accepted, and the clerk will please enter my appearance for James T. Furness, William H. Ash, Joshua P. Ash, and Dawes E. Furness.

CHAS. HART.

May 31, 1882.

Service of the within citation is accepted, and the clerk will please enter my appearance for Geórg- D. Krumbhaar.

C. H. KRUMBHAAR.

May 31, '82.

139 UNITED STATES OF AMERICA, } *sct:*
Eastern District of Pennsylvania, }

I, Samuel Bell, clerk of the circuit court of the United States of America for the eastern district of Pennsylvania, in the third circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of The Penn National Bank *vs.* James T. Furness *et al.* on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said court, at Philadelphia, this fifth day of June, in the year of our Lord one thousand eight hundred and eighty-two, and of the Independence of these United States the one hundred and sixth.

[SEAL.]

SAMUEL BELL,
Clerk of C. C.

140 *Assignments of Error.*

In the Supreme Court of the United States. Octo. Term, 1882.

THE PENN NATIONAL BANK, Suing, &c., Complainant below and Appellant,
vs.
JAMES T. FURNESS, EDWARD L. BRINLEY, *et al.*
No. 857.

1. The learned court below erred in declining to decree for the complainant there in accordance with the first pages of the bill, to wit: "That an inquiry may be had as to, and an account taken of, the extent to which the moneys, credits, or assets of the aforesaid copartnership of Furness, Ash & Co. had been used or applied in paying, settling, or arranging indebtedness at any time of the aforesaid copartnership of Furness, Brinley & Co.; and that the defendants herein, members of the said copartnership of Furness, Brinley & Co., may be ordered and decreed to repay the amount thereof, either into the registry of your honorable court, or to the defendant, George
141 D. Krumbhaar, assignee of the said firm of Furness, Ash & Co., as aforesaid, to be distributed according to law."

2. The same learned court erred in declining to decree for the complainant in accordance with the second page of the bill, to wit: "And that like inquiry may be had and account taken as to the extent which the money, credit, or assets of the said firm of Furness, Ash & Co. have been used or applied in procuring the means for, or making the payments to, the defendant, Edward L. Brinley, provided for in the writing aforesaid of October twenty-second last, 1877; and that the said Edward L. Brinley may be ordered and decreed to pay the amount thereof, either into the registry of your honorable court, or to the defendant, George D. Krumbhaar, assignee as aforesaid of Furness, Ash & Co., to be distributed according to law."

3. The same learned court erred in declining to decree for the complainant in accordance with the third page of the bill, to wit: "And that an inquiry may be had as to the capital, if any, with which the said firm of Furness, Ash & Co. started in
142 business, and as to whether the said firm ever had any reasonable prospect or rational expectation of conducting any legitimate business; and, if not, to ascertain for what purpose the said firm of Furness, Ash & Co. was created, and the busines thereof carried on; and if it shall be found that the said last-named firm was created, and the business thereof carried on, for the purpose of enabling the said Edward L. Brinley to fraudulently escape his personal and individual liability to the creditors of the firm of Furness, Brinley & Co., that then the said Edward L. Brinley may be held and treated as really a copartner in the aforesaid firm of Furness, Ash & Co., and may be ordered and decreed, upon an account taken of the assets of said firm, to make good to the complainants and other creditors of Furness, Ash & Co. the amount of the debts due them respectively of said firm."

4. The same learned court erred in declining to decree for the

complainant in accordance with the fourth pages of the bill, to wit: "And that the complainants may have such further and other relief as to your honors may seem meet, and the nature of their case may seem to require."

143 5. The same learned court erred in overruling the first exception of the complainant to the master's report below, to wit: "The learned master has erred in reporting, (p. 7), 'It further appears from the evidence that the indebtedness of Furness, Brinley & Co., on July 1st, 1877, the day of the dissolution as between Brinley and the firm of Furness, Brinley & Co., was $99,110.16, against $53,400.36 available assets, and $28,233.13 worthless assets; and on January 1, 1878, there was an indebtedness of $106,966.61, against, say, $36,439.88 of good assets, and $31,327.42 of worthless;' and he is respectfully requested to refer to said evidence, and especially to that of the schedule of assets, to which reference is made."

6. The same learned court erred in overruling the third exception of the complainant to the master's report below, to wit: "He has also erred in reporting, (p. 9), 'that there was no collusion between Brinley, J. T. Furness, J. P. Ash, and W. H. Ash, in the agreement for the withdrawal of Brinley and the payment to him of $25,000, nor was the same to defraud the then creditors of

144 Furness, Brinley & Co., nor any creditors of any firm which might succeed them.'"

7. The same learned court erred in finally decreeing that complainant's bill should be dismissed.

Wherefore the appellants, The Penn National Bank above-named, say there is error in the decree aforesaid and the record thereof, and humbly pray your honors that the said decree may be reversed and set aside, and that a *procedendo* may be thereupon awarded in this cause.

NATHAN H. SHARPLESS,
Of Counsel with Appellants.

145 [Endorsed:] 857. Oct. T., 1882. Supreme Court United States. Penn National Bank *v.* Furness, Brinley, *et al.* Assignments of error. Sharpless. Supreme Court U. S., 1884, October term. No. 221. The Penn National Bank, app'l't, *vs.* James T. Furness *et al.* Assignment of errors. Office Supreme Court U. S. Filed Jul. 12, 1884. James H. McKenney, clerk.

Endorsed on cover: E. Pennsylvania C. C. U. S. No. 221. The Penn National Bank, appellant, *vs.* James T. Furness, Francis Brinley, adm'r of Edward L. Brinley, dec'd, Joshua P. Ash, William H. Ash, Dawes E. Furness, and George E. Krumbhaar, who were sued with Henry Day. Filed 7th June, 1882.